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RECORDS AND BRIEFS

No. 06-1502

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In The
Supreme Court of the United States

LYNN M. KOFFLEY,

Petitioner,

v.

JOSEPH J. KOFFLEY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED FOR REVIEW

Did the Maryland courts violate Petitioner Lynn Keuthan's[1] right to substantive and procedural due process under the Fourteenth Amendment to the United States Constitution, when Ms. Keuthan's parental rights were *de facto* terminated, after she was denied any visitation with her daughters and the trial court (1) placed the burden on Petitioner to demonstrate that visitation was warranted, (2) made no finding that Ms. Keuthan was an unfit parent, and (3) declined to address the issue of visitation until such time as the children's State-appointed attorney recommended it?

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[1] During the course of these proceedings, the Maryland courts granted Petitioner Lynn Koffley's request to change her name back to Lynn Keuthan, and the courts below refer to her as Ms. Keuthan, although the official case caption has remained the same.

BEST AVAILABLE COPY

PARTIES TO THE PROCEEDINGS BELOW

Petitioner/Plaintiff Lynn M. Keuthan,
f/k/a Lynn M. Koffley.

Respondent/Defendant Joseph J. Koffley, Jr.

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OPINIONS IN THIS CASE

The opinions of the Circuit Court for Prince George's County, Maryland are unreported. The September 25, 2006 opinion of the Maryland Court of Special Appeals is unreported, and the Maryland Court of Appeals' denial of certiorari is reported at *Koffley v. Koffley*, 396 Md. 13, 912 A.2d 649 (2006). Three prior opinions have been issued in this case by the Maryland Court of Special Appeals. One is reported at *Koffley v. Koffley*, 160 Md. App. 633, 866 A.2d 161, *cert. denied*, 386 Md. 181, 872 A.2d 47 (2005). The other two prior opinions by the Maryland Court of Special Appeals are unreported.

BASIS FOR JURISDICTION

Jurisdiction is invoked in this Court pursuant to 28 U.S.C. § 1257. On September 25, 2006, the Maryland Court of Special Appeals affirmed the trial court order at issue in this case. The Maryland Court of Appeals denied certiorari on December 15, 2006. This Court granted Petitioner's request for a sixty day extension of the time for filing this Petition, to May 14, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Ms. Keuthan's Visitation Rights Before February 2004.

This case arises from a lengthy divorce and custody proceeding in which, for more than eight years, the Maryland courts granted Petitioner Lynn M. Keuthan visitation rights to see her three minor children, but abruptly revoked those rights in February 2004 without any of the findings properly required to support that revocation. Since February 2004, Ms. Keuthan has struggled to maintain even the most minimal contact with her children and to require the Maryland courts to accord her substantive and procedural due process consistent with that required by the United States Constitution. Particularly with respect to her youngest daughter, Ms. Keuthan has suffered a de facto termination of her parental rights without any proper finding that continued visitation would be detrimental to the child.

Ms. Keuthan was married to Joseph J. Koffley, Jr. ("Koffley") on May 28, 1988. Over the next five years they had three children: Katrina, born on October 29, 1988; Patrick, born on May 1, 1990; and Victoria, born on November 17, 1993.[2] Ms. Keuthan filed for divorce from

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[2] Ms. Keuthan's older daughter, Katrina, is now 18 years old. The issues in this case are the same with respect to both daughters, however, and Ms. Keuthan's younger daughter, Victoria, is only 13. It is not necessary, therefore, to address whether this case would be moot if Katrina were the only child for which visitation was denied, because all of the issues raised in this petition apply equally to Victoria.

This Petition does not address issues relating to Patrick, Ms. Keuthan's son. The circuit court ordered on March 15, 2007 that Ms. Keuthan would have physical custody of Patrick, but did not address the effective

Koffley in the Circuit Court for Prince George's County, Maryland on April 11, 1996. On May 29, 1997, Prince George's County Circuit Judge Joseph Casula awarded Koffley sole custody of the children and granted Ms. Keuthan extensive visitation rights with all three children that included alternate weekends from Thursday through Monday, the month of August, and certain holidays. Judge Casula entered an amended order on April 17, 1998, which provided Ms. Keuthan with some additional visitation days. [App. 68-71] A judgment of absolute divorce was entered on December 20, 1999.

The proceedings were contentious and, as even the circuit court eventually observed, Mr. Koffley sought to use his control over the children to harm Ms. Keuthan, requiring Ms. Keuthan to repeatedly seek to enforce her visitation rights. Following a contempt hearing in 2001, the parties entered a partial settlement providing for joint legal custody, and that the existing visitation schedule, which had been in effect for more than four years, would remain in effect. This agreement was embodied in a Temporary Consent Order dated October 16, 2001 (the "TCO"), which gave Ms. Keuthan and Koffley joint legal care and custody of the three children and which provided that the children should live with each parent alternately in accordance with the court-ordered schedule. [App. 62] The TCO provided that the circuit court would issue its order on any remaining issues "forthwith," and that the parties would reconvene for a hearing in May 2002 to review the TCO and determine whether it needed to be modified, vacated, or made permanent. [App. 66-67]

Throughout 2002, Koffley continued to frustrate Ms. Keuthan's ability to visit with her children, requiring her to file repeated motions seeking to enforce her visitation rights

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termination of Ms. Keuthan's rights to visit with her younger daughter.

with the court. On August 9, 2002, Koffley filed an unverified motion to modify visitation, containing a number of baseless claims about Ms. Keuthan or her supervision of the children when in her care, and Ms. Keuthan filed a cross motion seeking to require Koffley to comply with the visitation order. After an emergency hearing, the parties executed a consent order, which the court did not sign, that required continued visitation between Keuthan and the children under the existing schedule, and required that all missed visitation days be made up. Despite this consent order, however, Keuthan was again required to move for contempt on September 10, 2002. At a September 11, 2002 hearing, the parties agreed to settle Keuthan's motion by another consent order, which the judge again did not sign.

Koffley continued, however, to frustrate Ms. Keuthan's visitation, and she filed a motion for contempt on November 8, 2002 stating that Koffley had again failed to allow her access to the children and had further tried to prejudice her children against her by convincing them that she intended to kidnap them. On December 16, 2002, the circuit court heard Ms. Keuthan's motion along with a contempt motion filed by Koffley. The circuit court ruled that Koffley was using the children to "harm" and "tarnish" Ms. Keuthan and sentenced Koffley to 90 days incarceration, but stayed the sentence pending his future compliance with court-ordered visitation. [App. 42][3]

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[3] The circuit court found Ms. Keuthan in contempt based upon alleged non-payment of roughly $6,000 in child support. [App. 36-37] Ms. Keuthan appealed Judge Dawson's contempt finding to the Maryland Court of Special Appeals and, while the appeal was dismissed on the grounds that Judge Dawson never entered a final judgment, the appellate court also advised that Judge Dawson had failed to follow the required procedures to justify the court's contempt ruling, and noted that Ms. Keuthan had filed a

At the December 2002 hearing, Judge Dawson appointed Jo Benson Fogel as attorney for the children. The court, however, did not provide any details, verbal or written, about the scope of the court-appointed attorney's duties and authority and did not issue any order spelling out the basis or the scope of her appointment. The only Maryland authority that allows for such an appointment is Maryland Code Family Law Article 1-202, which permits a court to appoint counsel for a minor child in a contested custody, visitation, or support case. While the court below typically referred to Fogel as a "guardian *ad litem*," it is plain under Maryland law that appointments under § 1-202 are "purely as counsel." *Fox v. Wills*, 390 Md. 620, 622, 890 A.2d 726, 727 (2006). While Ms. Fogel interjected herself into all aspects of the proceedings, and even into the relationship between Ms. Keuthan and her children, Ms. Fogel would be more properly called a "court appointed attorney."

By June 2003, the circuit judge had refused to rule for more than three years on Ms. Keuthan's request to modify her child support payments, and Ms. Keuthan filed a motion asking that the judge recuse himself from the case, which was denied. In July 2003, Judge Dawson denied the recusal motion and reserved ruling on other motions until he received a report from Ms. Fogel, the court-appointed attorney. [App. 60]

Ms. Fogel's report was filed on September 2, 2003. In that report, she recommended that the court vacate the October 2001 TCO, grant sole custody to Koffley, and enter a modified visitation schedule that "primarily adopts the schedule set in placed [sic] by Judge Casula" in 1998. [App. 68-71] After a status conference on September 15, 2003,

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motion for reduction in child support in late 1999 that had been pending for 50 months, despite multiple hearings. [App. 46-47]

Judge Dawson ordered that a custody hearing be set for February 2004.

B. Ms. Keuthan Is Stripped Of Her Visitation Rights.

Before the February custody hearing, Ms. Keuthan sent a letter to Chief Judge Robert M. Bell, who is the chief administrator of Maryland's court system as well as the Chief Judge of Maryland's highest court. In that letter, Ms. Keuthan expressed her dismay that Judge Dawson had failed to rule on her petition to modify child support, which had been pending since 1999. That letter was sent on January 20, 2004. On January 23, 2004, Judge Dawson ordered the parties to attend an immediate hearing, which was ostensibly supposed to address issues relating to the sale of the marital home. At this hearing, Judge Dawson berated Ms. Keuthan's counsel, inquiring about statements in the letter to Judge Bell and complaining that he had been misquoted by Ms. Keuthan. [App. 73-76]

At this same hearing, Ms. Fogel asserted a new role that extended beyond simply appearing as attorney for the children. Ms. Fogel asserted that she was entitled to discovery in the case, despite the fact that neither she nor the children were parties to it, and she claimed that she was entitled to know details from Ms. Keuthan relating to a trust. Mr. Fogel asserted a broad right to find out if there were "funds available for the children" for costs such as payment of Ms. Fogel's fees or "for mental health reasons." [App. 76]

Judge Dawson set the custody hearing for February 9, 2004, and denied Ms. Keuthan's repeated request that he recuse himself from the case. At that hearing, no evidence was presented to justify termination of Ms. Keuthan's visitation rights. To the contrary, Licensed Clinical Social Worker Marguerite Sullivan was called as an expert witness

by Ms. Fogel, and testified that the children needed to spend *more* time with their mother, and that it was in the children's best interests to spend time with her consistent with the schedule originally ordered by Judge Casula, and in effect since 1998. Notwithstanding this testimony by her own expert, Ms. Fogel herself argued that Ms. Keuthan should *not* be permitted to continue to visit the children.

Following the hearing the Court issued a terse order on February 13, 2004 that all visitation between Ms. Keuthan and the children was "suspended." [App. 58-59] On February 24, 2004, Judge Dawson issued yet another order, purporting to "rescind" all prior orders that permitted visitation, and stating that the issue of visitation would not be addressed again until June 2004. [App. 56-57] In June 2004, Judge Dawson issued yet a third order asserting that the "suspension" should "stay in effect" and increasing Ms. Keuthan's child support obligation. [App. 53-55]

Ms. Keuthan appealed the February and June orders to the Maryland Court of Special Appeals, on the grounds, among other things, that Judge Dawson's suspension of visitation violated her substantive and procedural due process rights. The appellate court sidestepped this issue, however. Instead, the court found that Ms. Keuthan's due process arguments

> are moot in light of (1) the appellee's agreement that the appellant is entitled to *some* type of visitation, and (2) the hearing that is presently scheduled for February 18, 2005, at which the circuit court is hereby directed to apply the procedure set forth in *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114 (2003).

[App. 28][1]. The Court of Special Appeals held that "[t]he visitation provision at issue in the case at bar is hereby converted to a *pendente lite* order that will remain in effect until the parties are once again before the circuit court." [App. 35]

The Court of Special Appeals also addressed the propriety of Judge Dawson's continued involvement and, while the court was reluctant to sanction Judge Dawson or hold that he had abused his discretion, the court observed that "it is important that the court conduct those proceedings in a way that the party who disagrees with the court's decision will nonetheless understand . . . the 'proceedings [have been] justly determined.'" The appellate court suggested that Judge Dawson should recuse himself, stating that "it would not be an abuse of discretion for the circuit court to conclude that the case at bar has reached the point at which the interests of the parties and the children would be best served if a different judge conducts the further proceedings required by this opinion." [App. 34-35] Judge Dawson subsequently recused himself and the case was assigned to Prince George's County Circuit Judge C. Philip Nichols.

C. The Hearing Before Judge Nichols.

On July 14, 2005, the parties appeared before Judge Nichols, and began a hearing that took place on four dates over a span of more than four months. Three experts in clinical psychology, Dr. Philip Briley, Dr. Henry K. Sweeney, and Dr. Joyanna Silberg, and an expert in pediatrics testified on behalf of Ms. Keuthan. None of the

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[1] In *Frase*, the Maryland Court of Appeals ruled that a circuit court must make an appropriate and final determination of visitation and custody issues, based upon proper evidence, and cannot hold such determinations open for periodic review. *Frase v. Barnhart*, 379 Md. 100, 120-23, 840 A.2d 114, 126-28 (2003).

children testified at the hearing. Patrick spoke with the judge alone in chambers on one occasion, although that discussion was not on the record and the court made no summary of it.

Throughout these proceedings, Mr. Koffley pursued a strategy of preventing the court from conducting an independent evaluation of the merits of Ms. Keuthan's right to visitation. His counsel repeatedly claimed that issues were "res judicata" and claimed that Ms. Keuthan had not demonstrated a "material change in circumstances" to justify any change in custody with respect to Katrina and Victoria.

For her part, Ms. Fogel continued to obstruct any effort by Ms. Keuthan to visit with any of her children, even Patrick who had asked that she be replaced.[5] Ms. Fogel's obstructionist tactics were noted by the mental health professionals who sought to testify on Ms. Keuthan's behalf. As Dr. Silberg testified, Ms. Fogel's efforts to prevent Dr. Silberg from reviewing medical records were "contrary to everything that I have experienced in Maryland," and "[t]he manner and the way you are describing it [referring to Ms. Fogel], preventing an expert witness from access to records that the mother has access to that are part of a contentious decision, never in my history in 22 years has a G-A-L or Nagel versus Hooks attorney ever prevented my access to records like that." Based on the limited information that she had been able to obtain, over Ms. Fogel's objection, Dr. Silberg "determined that Patrick is traumatized and I have determined on the information that we have from Patrick that there is reason to be quite concerned about the mental health of the two girls."

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[5] In her opening statement, Ms. Fogel admitted that Patrick had told her that he wanted to fire her and replace her with another attorney who would represent his interests, but she declined to follow his wishes because he had not been willing to set them forth in writing.

On November 27, 2005, the circuit court issued its findings from the bench, and ordered Koffley to remain as the sole legal and physical custodian of the three children. [App. 19-22] The court ordered monthly visitation between Ms. Keuthan and Patrick, but denied Ms. Keuthan any and all visitation with the two girls. Instead, the Court declined to address the issue until Ms. Fogel, the court appointed attorney, recommended it and a health care provider expressed to Ms. Fogel that it would be in the girls' best interest to revisit the issue (even though testimony from mental health professionals as to the importance of such visitation had already been presented to the court):

> Once there is some recommendation from [Ms. Fogel] that we need to address the visitation issue as put to you by the child's current mental health care professional, I'll address that issue. Once someone in a position as a health care provider suggests that it would be in the child's best interest to do that, we'll certainly take another look at it. I don't know that it's happened to the point where I'm satisfied it's in their best interest just yet.

[App. 22] The court issued a written order to that effect on December 27, 2005. [App. 16]

D. The Appeal To The Court of Special Appeals.

Ms. Keuthan appealed to the Maryland Court of Special Appeals, contending that it had been improper for the circuit court to place the burden on her of proving that she was a fit parent entitled to visitation. The Court of Special Appeals rejected this argument, on the basis that the February and July 2004 orders had already stripped Ms. Keuthan of her visitation rights. These were the same orders that Ms. Keuthan challenged on due process grounds, but for which the Court of Special Appeals found the issues to have

been "moot" because of a supposed stipulation by the opposing party that visitation should be awarded.

As a result of this *volte face*, the Court of Special Appeals now concluded that Ms. Keuthan should bear the burden of proving a change in circumstances to justify modification of the 2004 Orders. [App. 11] In essence, in being denied any visitation, Ms. Keuthan has suffered a *de facto* termination of her parental rights with respect to her daughters, one of whom is still in the age of minority, even though no Maryland court has issued any final order in which proper findings were made that Ms. Keuthan was not a fit parent. To the contrary, Ms. Keuthan had been deemed a fit parent for eight years prior to the *de facto* termination of her rights to visitation with her daughters.

ARGUMENT

By excluding Ms. Keuthan from all contact with her daughters, the circuit court *de facto* terminated Ms. Keuthan's parental rights without any finding that she was unfit to serve as a parent, and the court violated Ms. Keuthan's rights to substantive and procedural due process. These actions by the circuit court, however, are unfortunately not unique but reflect a broader pattern that this Court should address. As one scholar recently observed "[d]espite the current war in Iraq capturing a great deal of the media attention, much less consideration has been given to the unresolved thirty-year-old family conflict between post-divorced mothers and fathers that has recently escalated into a full fledged war over children." Kenneth S. Mitchell-Phillips, Sr., *Five Steps to a Healthy Divorce: A More Supportive Legal Approach to Post-Divorce High-Conflict Relationships*, 6 WHITTIER J. CHILD. & FAM. ADVOC. 147, 147 (2006). Custodial parents frequently use their access to their children to distance the children from the non-custodial parent. The non-custodial parent is then forced into repeated and protracted litigation simply to enforce even minimal rights to visit his or her own children. The practice of

appointing "guardians" with no clear mandate or limitations on their authority simply exacerbates this conflict, as such guardians themselves frequently usurp the role that mothers such as Ms. Keuthan should rightfully play.[6] All too often, as in this case, the easiest solution for a busy court is to uncritically follow the guardian's lead, and to exclude one parent all together. This is precisely what has happened in this case, and the circuit court's *de facto* termination of Ms. Keuthan's parental rights, by denying her any contact with her daughters, violated the long-cherished and fundamental constitutional rights that all parents hold.

I. The *De Facto* Termination Of Ms. Keuthan's Parental Rights Violated Her Right To Substantive Due Process.

Ms. Keuthan's interest in retaining at least *some* contact with her daughters, consisting of at least minimal rights to visitation, is every bit as strong as the parental interest addressed by the Court in *Santosky v. Kramer*, 455 U.S. 745 (1982), and other cases. The Due Process Clause to the Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Particularly in the context of a parent's right to have a relationship with her child, the Due Process Clause "guarantees more than fair process," but also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v.*

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[6] "Whether or not family courts actually intend it, the fact is that the appointment of a law guardian-particularly one who is hostile to the mother-means that the guardian begins to function in many respects as if the guardian, not the mother, had parental rights, forcing the mother aside." Dr. Amy Neustein & Michael Lesher, *From Madness to Mutiny* 105 (Northeastern Univ. Press 2005).

Glucksberg, 521 U.S. 702, 719-20 (1997); *see also Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

A parent's fundamental right to participate in the care, custody, and control of her children is "deeply rooted in our Nation's history and tradition," *Bellotti v. Baird*, 443 U.S. 622, 638 (1979), it is "as old and as fundamental as our entire civilization," *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1965) (Goldberg, J. concurring), and it is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality). Since 1923, it has been clear that the Due Process Clause's protections for "liberty" include a parent's right to "establish a home and bring up children" and "to control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) (holding that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"). As the court stated in 1944, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

As a right existing long before the United States Constitution, a parent's right to raise and have contact with her children "[has] its origins entirely apart from the power of the State," *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977). Indeed, this Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected," *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), and that the "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment is impaired by the permanent division of parent and child, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). As the United States Court of Appeals for the Fifth Circuit Court has explained:

> It is difficult to imagine a loss more grievous than that of a parent deprived of his or her child. The bond between parent and offspring is one of the central facts of nature as well as of society and the Supreme Court has frequently noted the fundamental character of this relationship.

Davis v. Page, 640 F.2d 599, 603 (5th Cir. 1981).

In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court discussed at length a parent's right to maintain contact with her child, in the context of parental termination proceedings. The Court concluded that "[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Id.* at 753. Ms. Keuthan's interest in retaining at least *some* contact with her daughters, consisting of at least minimal rights to visitation, is every bit as strong as the parental interest addressed by the Court in *Santosky* and prior cases. Not only has Ms. Keuthan been deprived of physical and legal custody of her daughters, as well as any opportunity to affect or participate in their upbringing, she no longer has even been guaranteed the right to visit with them. As the Court stated in *Santosky*, "[t]he private interest affected is [particularly] commanding" where parents oppose "the irretrievable destruction of their family life." *Id.* at 758.

Here, it was not found that Ms. Keuthan is not a fit parent, and the Maryland courts imposed the burden upon *her* to prove that she is entitled to visitation. This was inappropriate and it violated Ms. Keuthan's fundamental right to substantive due process.

II. The Maryland Courts Violated Ms. Keuthan's Procedural Due Process Rights.

Because of Ms. Keuthan's commanding interest in participating in the care of her children, the State could not properly deprive her of that interest by requiring *her* to prove

that visitation was warranted. "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs," and "fundamentally fair procedures" are necessary "[w]hen the State moves to destroy weakened familial bonds." *Santosky*, 455 U.S. at 753-54. Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), Ms. Keuthan's significant parental interests in maintaining contact with her children mandate that the burden of justifying a termination of all parental visitation must lay with the person seeking such termination, and must be based upon evidence that visitation would be harmful to the child. *Cf. Stanley*, 405 U.S. at 651.

This Court has long held that the scope of due process protections must be commensurate with the private interest at issue. *See Mathews*, 424 U.S. at 335 (noting that the private interest is one of the most significant factors to be considered) Where a fundamental, protected right is involved, the *magnitude* of the loss must be considered in determining the scope of the procedural safeguards that the Fourteenth Amendment requires. *See Gross v. Lopez*, 419 U.S. 565, 575-76 (1975). Here, the Maryland courts have deprived petitioner of her right to raise, visit with, and shape the lives of her daughters in a manner every bit as effective as a termination of Ms. Keuthan's parental rights.

There may be no more "significant deprivation of liberty" than the termination of the parent-child relationship. *Addington v. Texas*, 441 U.S. 418, 425 (1975). In the context of a termination of parental rights, "[w]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosky*, 455 U.S. at 760. Courts have equated this deprivation with "imposition of a fine or imprisonment through criminal proceedings." *Davis v. Page*, 618 F.2d 374, 379 (5th Cir. 1980). Although termination of parental rights does not involve a jail term, an obvious form of

physical separation occurs when parents are permanently deprived of the right to nurture and partake in the lives of their children. One court described termination as a "drastic, final step which, when improvidently employed, can be fraught with danger." *Alsager v. District Court*, 406 F. Supp. 10, 24 (S.D. Iowa 1975). Thus, when a parent's fundamental interest in raising his or her children is threatened, only the most "powerful countervailing interest[s]" can outweigh the abridgement of the right. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

This Court has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof in a number of contexts addressing rights no more significant than Ms. Keuthan's right to maintain at least minimal contact with her daughters. The Court has required that the State bear an elevated burden of proof in juvenile delinquency proceedings, *In re Winship*, 397 U.S. 358, 370 (1970), in civil commitment proceedings, *Addington*, 441 U.S. at 425, in deportation proceedings, *Woodby v. INS*, 385 U.S. 276 (1966), and in denaturalization proceedings, *Chaunt v. United States*, 364 U.S. 350 (1960); *Schneiderman v. United States*, 320 U.S. 118 (1943). In *Santosky*, this Court held that the State must bear the burden of proof by clear and convincing evidence before the State could properly terminate a parent's natural rights to participate in the care of her children. *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982).

In this case, while the State was not originally a party to the custody dispute between Ms. Keuthan and her former husband, it was the "State," in the person of Judge Nichols, who determined that Ms. Keuthan would not be permitted to even to visit her daughters. The "State" also interjected itself into these proceedings in the person of Ms. Fogel, who was nominally appointed by the Court as an attorney or a neutral "guardian" to present views to the Court as to the children's best interests, but who quickly became an advocate for one

of the parents against the other in this long-running and acrimonious dispute.

Moreover, while private custody disputes may or may not raise sufficient concerns to warrant the imposition of a *clear and convincing* burden of proof before all parental visitation rights are terminated, the burden of proof should never be slanted *against* a parent's right to maintain minimal contact with her child. In *Troxel v. Granville*, 530 U.S. 57 (2000), a plurality of the Court recognized that, unless a parent has been found to be "unfit," "there is a presumption that fit parents act in the best interests of their children." *Id.* at 68 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979). The Maryland court made no finding that Ms. Keuthan's daughters would be harmed by visitation, but instead ruled that Ms. Keuthan had failed to prove that visitation was warranted, and gave *Ms. Fogel*, the State-appointed attorney, control over whether visitation would ever be awarded. At a minimum, the burden should have been upon the State-appointed attorney, Ms. Fogel, and the father, Mr. Koffley, to demonstrate some harm that would require that *all* contact between Ms. Keuthan and her daughters be severed. There was no such demonstration.

III. Under The Due Process Clause, The Burden Of Proof Should Weigh *Against* Termination Of All Parental Visitation, And The Courts Should Be Required To Find That A Parent Is Unfit Before All Rights To Visitation Are Terminated.

A clear ruling by this Court that the United States Constitution requires that the burden of proof must weigh *against* termination of all visitation rights, and requiring a finding that a parent is unfit before terminating all visitation, will prevent significant errors constitutional such as the one made by the Maryland courts in this case. Here, the circuit court did not cite any harm to either of Ms. Keuthan's daughters that would come from visitation, but instead

adopted the view of Ms. Fogel, the State-appointed attorney, that Ms. Keuthan's visitation rights should be terminated because, in Ms. Fogel's view, Ms. Keuthan had been too litigious in seeking to enforce the rights to visitation that she had originally been given. [App. 20] The court, in fact, declined even to address the issue of visitation with Ms. Keuthan's daughters in its ruling, stating instead that it would not address that issue until Ms. Fogel, who was appointed by the court itself, recommended visitation. In the court's words, "[o]nce there is some recommendation from [Ms. Fogel] that we need to address the visitation issue as put to [Mr. Fogel] by the child's current mental health care professional. I'll address that issue." [App. 22]

On appeal, the Maryland Court of Special Appeals ruled that the circuit court had appropriately placed the burden of proof on Ms. Keuthan, and the appellate court found this appropriate based upon the very order that it had earlier found it unnecessary to review on the grounds of mootness, after it was stipulated that visitation would be appropriate. [App. 4-5] Thus, Ms. Keuthan was first deprived of her constitutional challenge to the February 2004 termination of her visitation rights, and was then required to bear the burden of proof in the circuit court to demonstrate that she should get her visitation rights back. When she tried to make that showing, the trial court refused to address the issue in any detail but instead deferred the matter to the State-appointed attorney.

In addition to the patent unfairness of these procedures, the circuit court's failure to make proper findings and its deference to the state-appointed attorney in this case demonstrates the extent to which Ms. Keuthan's dilemma is merely illustrative of a larger problem worthy of this Court's attention. Courts frequently permit State-appointed "guardians" to overstep their limited roles as attorney and to usurp the role properly held by the parents. "The duties of attorneys representing children are not

adequately addressed by existing ethical rules, standards, statutes and case law," Ann M. Haralambie, *The Role of the Child's Attorney In Protecting The Child Throughout The Litigation Process*, 71 N.D.L. REV. 939, 944 (1995), even though such attorneys come into a custody or visitation case under the misconception that they, and only they, are neutral arbiters:

> The flawed rationale for appointing these GALs in custody cases is that all parents, who are presumed competent to raise their children and beyond the state's heavy hand prior to the commencement of the divorce case, are somehow automatically transformed into mere combatants inherently blind to their children's needs, and whose offspring now need the wisdom and control of some typically young lawyer, needing the fee, to avoid falling into the vortex of the litigation.

Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case For Abolition*, 3 LOY. J. PUB. INT. L. 106, 110-11 (2002). "[M]ost courts . . . ascribe to the GAL and his or her opinion a level of competence, validity, wisdom, credibility and objectivity richly undeserved." *Id.* at 119.

This is particularly true where there are allegations of past abuse, as in this case. *See id.* at 135-36 (noting that "[p]rofessionals across the country are appalled that the GALs are actively and forcefully advocating for the children whose interest they are mandated to protect to be placed with violent child abusers and sexual molesters"). In such cases, it is the *non-abusive* parent, fighting to protect her children, that is most at risk of appearing "unstable." According to the American Psychological Association,

> [Child] custody and visitation disputes appear to occur more frequently when there is a

> history of domestic violence. Family courts often do not consider the history of violence between the parents in making custody and visitation decisions. In this context, the non-violent parent may be at a disadvantage, and the behavior that would seem reasonable as a protection from abuse may be misinterpreted as a sign of instability.

Violence and the Family: Report of the American Psychological Association Presidential Tack Force on Violence and the Family 100 (1996). The full record in this case bears every hallmark of this recurring problem, from the Court's refusal to take concerns of abuse seriously through to the guardian's inability to accept her neutral and limited role, as opposed to becoming an advocate for one parent at the expense of the other. The Maryland courts erred when they required Ms. Keuthan to bear the burden of proving her right to visitation, without any finding that she was an unfit parent, and when they improperly delegated to a State-appointed attorney the question of whether such visitation would ever be awarded. A clear statement from this Court that the burden of proof cannot be imposed upon the parent seeking visitation, and requiring a finding of unfitness before all visitation rights can be terminated, would be an important step needed to address this recurring and important problem.

CONCLUSION

For all of these reasons, Ms. Keuthan respectfully asks that this Court grant certiorari in this case.

Respectfully submitted,

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I. Material Pursuant To Rule 14(1)(i)(i)

LYNN M. KOFFLEY	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	Petition Docket No. 425
JOSEPH J. KOFFLEY, JR.		September Term 2006
	*	
		(No. 2606, Sept. Term, 2005
	*	Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: December 15, 2006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2606

September Term, 2005

LYNN M. KOFFLEY

v.

JOSEPH J. KOFFLEY, JR.

Salmon
Moylan, Charles E., Jr.
(retired, specially assigned)
Alpert, Paul E.
(retired, specially assigned), JJ.

Opinion by Moylan, J.

Filed: September 25, 2006

This case has a long and tortured history, and it is mercifully unnecessary for us to revisit most of it. Chief Judge Murphy captured the essence of it in the opening paragraph of Koffley v. Koffley, 160 Md. App. 633, 635-36, 866 A.2d 161 (2005).

> The parties to these combined appeals from the Circuit Court for Prince George's County--Lynn M. Koffley, appellant, and Joseph J. Koffley, Jr., appellee--were married on May 28, 1988, and were divorced by a judgment of absolute divorce signed

> on December 20, 1999 and docketed on December 27, 1999. They are the parents of a sixteen year old daughter, a fourteen year old son, and an eleven year old daughter. Their failure or refusal to agree on what is in the best interest of their children has resulted in an enormous amount of litigation, including (1) nine contempt petitions filed by the appellant, (2) seven contempt petitions filed by the appellee, (3) the combined appeals that we address in this opinion, (4) several other appeals to this Court, (5) Protective Order proceedings in the District Court of Maryland for Prince George's County, and (6) proceedings in the United States Bankruptcy Court for the Eastern District of Virginia.

The mandate of that opinion, filed on January 25, 2005, provided in part:

> ORDER SUSPENDING APPELLANT'S VISITATION VACATED AS A "FINAL" ORDER AND CONVERTED, TO A PENDENTE LITE ORDER; JUDGMENTS OTHERWISE AFFIRMED; CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

Pursuant to that remand, a hearing was conducted in the Circuit Court for Prince George's County before Judge C. Philip Nichols on July 14, August 26, October 27, and November 29, 2005. After making certain findings of fact on the record in open court, Judge Nichols filed his Order on December 27, 2005.

The appellant, Lynn M. ("Keuthan") Koffley, challenges Judge Nichols's decision in three regards. She contends

> 1. that Judge Nichols erred in treating an earlier visitation order that we, in Koffley v. Koffley, 160

Md. App. at 636-38, 646, converted to a pendente lite order as establishing the permanent visitation rights of the parties and placing the burden on the appellant of showing that she should have visitation with her children;

2. that Judge Nichols erroneously allowed the court-appointed attorney for the minor children to continue to serve in that capacity without having considered and ruled upon the appellant's Motion to Remove the Guardian *Ad Litem*; and

3. that Judge Nichols erroneously failed to follow the direction of this Court in Koffley v. Koffley, supra, that the appellant be granted visitation privileges with her two daughters, Katrina and Victoria.

The Pendente Lite Visitation Order

All three of the appellant's contentions are concerned with the question of whether Judge Nichols, on remand, properly followed and applied the decision of this Court in Koffley v. Koffley. That opinion is our point of departure. In that opinion, dealing with what was in effect a consolidation of two appeals, we were viewing two earlier decisions by Judge Herman C. Dawson. The first was Judge Dawson's Order of February 24, 2004, and the second was his Order of June 25, 2004. With the single exception of our procedural modification of the visitation order, we affirmed what Judge Dawson had done. Our mandate was unambiguous: "JUDGMENTS OTHERWISE AFFIRMED."

In his Order of February 24, 2004, Judge Dawson expressly reaffirmed the vitality of an earlier Order by Judge Joseph S. Casula, on April 17, 1998, that sole legal and physical custody of the three minor children be granted to the appellee. The appellant appealed that custody order. In an unpublished decision, this Court affirmed the order on February 24, 1998. Koffley v. Koffley (No. 1064,

September Term, 1997). Other than preserving that custody order, the slate was wiped clean by Judge Dawson and the case was, as of February of 2004, to have a fresh beginning. The Order of February 24, 2004, directed

> . . . that all other orders of this court pertaining to the issues of custody and visitation other than the provisions in the amended order of court of Judge Casula dated April 17, 1998 granting defendant the sole legal and physical custody of the three minor children are vacated and rescinded.

(Emphasis supplied).

Of direct pertinence to what became the pendente lite order, Judge Dawson had issued a "Forthwith Order of Court," which provided "that all visitations between [the appellant] and the involved three minor children, be and hereby is SUSPENDED." By his Order of June 25, 2004, Judge Dawson reconfirmed that complete suspension of all visitation by the appellant.

> ORDERED, that the suspension of the Plaintiff's right to have visitation with the three (3) minor children of the parties, namely, Katrina, Patrick and Victoria, shall stay in effect pending further Order of Court.

(Emphasis supplied).

In Koffley v. Koffley, 160 Md. App. at 637, we referred to the suspension of visitation privileges.

> [T]he appellant's right to visitation was not "suspended" until February 13, 2004, on which date the circuit court entered a FORTHWITH ORDER that is at issue in Case No. 46. The pendente lite support order was not superseded until the conclusion of a June 21, 2004 hearing, following which the circuit court entered the orders at issue in Case No. 910. The appellant argues that the circuit

> court erred and/or abused its discretion in entering several orders, including orders providing:
>
> > that all visitations between the [appellant] and the involved three minor children, be . . . SUSPENDED . . . .

(Emphasis supplied).

It was because the appellee agreed that the appellant should be granted some visitation, albeit supervised visitation, that this Court converted the permanent order denying visitation into a pendente lite order. We directed that the ban on visitation remain in effect until the circuit court had the opportunity to have a further hearing on that issue. At that point, a hearing was scheduled for February 18, 2005. We further directed the circuit court, at that hearing, to adhere to the procedures laid out in Frase v. Barnhart, 379 Md. 100, 840 A.2d 114 (2003).

> In light of the appellee's agreement that the appellant should be granted some type of "supervised" visitation with the children, the order "suspending" her visitation must be vacated. We shall therefore direct (1) that the order that presently controls the appellant's right to visitation be converted to a pendente lite order until the parties are once again before the circuit court, and (2) that further proceedings in the circuit court adhere to the procedure required by Frase v. Barnhart, 379 Md. 100 (2003).

160 Md. App. at 637.

Our primary concern in directing the circuit court to make a decision on visitation was that the decision be as definitive as possible and that the hearing court recognize, per Frase v. Barnhart, that in deciding a private custody dispute, as opposed to a CINA petition, the court should avoid periodic review hearings. That was the central thrust

of our remand as we quoted, 160 Md. App. at 640-41, at length from Frase v. Barnhart, 379 Md. at 120-21:

> It is common--and in some instances required--for juvenile courts, in dealing with children who have been found in need of assistance (CINA), to have periodic review hearings to monitor the progress of the child, the child's parents, and any other guardian or potential custodian. In that setting, of course, the child has already come under the direct jurisdiction and supervision of the court and may well be in the legal custody of the court. By statute, the court's comprehensive jurisdiction extends until either the child turns 21 or the jurisdiction is affirmatively terminated by the court. See CJP § 3-804(b). The context, which justifies the direct and continuing supervision of the court, is that, as part of the CINA finding, the court has determined that court intervention is required to protect the child's health, safety, and well-being. See CJP § 3-801(f) and (m).
>
> The court's role is different in a normal private custody dispute. It is to take evidence and decide the dispute, so that the child and the other parties can get on with their lives. The court does not retain jurisdiction until the child turns 21, or even 18. Although the matter of custody, visitation, and support may always be reopened upon a showing of changed circumstances, the court's jurisdiction over the particular dispute ends when the dispute is resolved, which the law anticipates will occur within a reasonable time after the evidentiary hearing. Those kinds of cases are not to be strung out indefinitely, as though they were CINA cases.
>
> For good cause, the court may hold a case open for a reasonable period to consider additional

> evidence, not available at trial but which the court finds necessary to a proper decision. What it may not do, however, is to proceed to make findings that would dictate a particular result and then . . . to continuing review hearings. When it does that, the case never ends; the child and the parties remain under a cloud of uncertainty, unable to make permanent plans. The court seemingly reserves the power to alter the custody arrangement at any time, even in the absence of a new or amended petition, based on a later review of circumstances known or predicted to exist at the time of the initial determination. That is procedurally impermissible.

(Emphasis supplied).

In the meantime, this Court kept in place the status quo, the total ban on visitation by the appellant, until the circuit court had the opportunity to consider the matter. Our only quarrel with the earlier orders on the visitation question was that they, in the manner frowned upon by Frase v. Barnhart, had kept the question open and subject to periodic review. We gave no intimation whatsoever as to what the decision of the circuit court should be, once the merits of visitation were before it.

> The visitation provision at issue in the case at bar is hereby converted to a pendente lite order that will remain in effect until the parties are once again before the circuit court.

160 Md. App. at 641 (emphasis supplied).

The appellant's contention that Koffley v. Koffley vacated Judge Dawson's ban on visitation of February 24 and June 25, 2004, and ordered a return to an earlier decision of April 17, 1998, in which the appellant had been awarded visitation rights, as the baseline or point of analytic departure is pure fantasy. We did no such thing. Indeed, Judge Dawson had, on February 24, 2004, ordered all earlier

orders, save one awarding custody to the appellee, "vacated and rescinded." In Koffley v. Koffley, we affirmed that order to vacate and rescind.

What Judge Nichols did, with respect to the son, Patrick, who is 16 years of age, was to lift the total ban on visitation by the appellant. Judge Nichols found in this regard.

> I have spoken with Patrick privately . . . It's clear from what you've told me that you know [that] his desire is to be with his mom. I really don't think it's in his best interest. I have weighed all the factors that Maryland law requires me to weigh. . . .
>
> I do recognize that he needs to have a relationship with his mom and he desperately wants one. I'm going to increase the visitation. ... I'm going to let her visit with Patrick one weekend a month and it will start on Saturday morning at 9 o'clock and conclude Sunday evening at 6:00 and she'll make the transportation arrangements to do that. I think that in his best interest and maybe this will be beneficial to him and perhaps to her.

(Emphasis supplied).

Judge Nichols's Order of December 27, 2005, provided:

> ORDERED, that beginning with the month of December, 2005, the Plaintiff/Counter-Defendant shall have visitation with the minor child, PATRICK KOFFLEY, on the first full weekend of each month from Saturday at 9:00 a.m. until Sunday at 6:00 p.m.; if the first of the month falls on a Saturday, that weekend shall constitute the first full weekend of that month; if the first of the month falls on a Sunday, the first full weekend shall begin the following Saturday; and, it is further

> ORDERED, that the Plaintiff/Counter-Defendant shall also have visitation with her minor son, PATRICK, during the 2005 Christmas holiday from December 25, 2005, at 6:00 p.m. until Wednesday, December 28, 2005, at 6:00 p.m.; and it is further
>
> ORDERED; that the Plaintiff/Counter-Defendant shall be solely responsible for all transportation with respect to visitation with her son, PATRICK.

(Emphasis supplied).

With respect to the two daughters, Judge Nichols found that no evidence had been adduced showing that it was in the best interests of the daughters to be involved in visitation with the appellant. With respect to the older daughter, Katrina, incidentally, she was, as of the day this appeal was orally argued, just six weeks shy of her eighteenth birthday. Judge Nichols was willing, however, to reconsider the issue if evidence in that regard could be provided.

> Once there is some recommendation from [the guardian ad litem] that we need to address the visitation issue as put to you by the child's current mental health care professional, I'll address that issue. Once someone in a position as a health care provider suggests that it would be in the child's best interest to do that, we'll certainly take another look at it. I don't know that it's happened to the point where I'm satisfied it's in their best interest just yet.

(Emphasis supplied).

Judge Nichol's Order of December 27, 2005 was to that effect.

> ORDERED, that Plaintiff/Counter-Defendant's request for visitation with the minor daughters,

> KATRINA and VICTORIA, is hereby denied at this time.

As a subcontention, the, appellant argues that the appellee was erroneously not required to show a material change in circumstances. The contention is twice flawed. In the first place, it is based on the appellant's belief that the point of departure was the order of April 17, 1998. It was not. The points of departure were Judge Dawson's orders of February 24 and June 25, 2004. No material change in circumstance would have been required because the visitation, with respect to the two daughters, did not in any way change. The change with respect to Patrick's visitation, moreover, changed in the appellant's favor.

Quite aside from the inappropriate procedural posture of the appellant's contention, the rule about a showing of a material change in circumstances has no applicability when one is proceeding from a pendente lite order to a final adjudication. In Kerns v. Kerns, 59 Md. App. 87, 97, 474 A.2d 925 (1984), Judge Bloom pointed out:

> While it is true that Kristina had been in the custody of appellant, such custody was by virtue of a temporary, pendente lite order to remain effective only until there could be a final adjudication of the custody dispute. There was no need for appellee to show a change of circumstances.

(Emphasis supplied). See also Knott v. Knott, 146 Md. App. 232, 259, 806 A.2d 768 (2002) ("The change in circumstances requirement is not applicable in establishing a final award that terminates a pendente lite order."); Reuter v. Reuter, 102 Md. App. 212, 241, 649 A.2d 24 (1994); Rock v. Rock, 86 Md. App. 598, 615, 587 A.2d 1133 (1991) ; Payne v. Payne, 73 Md. App. 473, 481, 534 A.2d 1360 (1988) ("[W]e think it is not appropriate to apply the 'change in circumstance' requirement to pendente lite orders.").

Court Appointed Attorney
For the Minor Children

On December 16, 2002, Judge Dawson appointed Jo Benson Fogel, Esq. to serve as the Attorney for the Minor Children. From the outset, the appellant was opposed to the appointment. In her second appeal to this Court, the appellant challenged the appointment.

> Fourth, [the appellant] argues that the court appointed a guardian ad litem ("GAL") as a sanction, and that the court failed to indicate how [the appellant] could purge this appointment.

In our unpublished opinion in Koffley v. Koffley, (No. 3042, September Term, 2002, filed on May 13, 2004), we pointed out that a therapist who had worked with the appellant "recommended that the court appoint a GAL to facilitate visitation" and that the "court subsequently accepted that recommendation." Our opinion went on to affirm the appointment of the Attorney for the Minor Children

> [The appellant's] assertion that the court appointed the GAL as a sanction for her contempt is without merit. Dr. Briley testified that visitation with both parents was in the best interest of the children, and that the children might resist visiting with [the appellant] for reasons unrelated to her ability to care for them. The court "wanted to find out what was going on [at the children's homes and during visitation]," and it wanted the GAL "to represent the [children's] interests." The court has discretion to appoint counsel to investigate and to serve as a GAL. Miller, 113 Md. App. at 400 (citing Leary v. Leary, 97 Md. App. 26, 40 (1993)). We affirm the court's appointment of a GAL.

(Emphasis supplied).

In Koffley v. Koffley, 160 Md. App. 633, the appellant again challenged the appointment. On that occasion, however, the challenge was that

> The Judge Erred by Engaging a Single Attorney Without Any Guidance to Represent Three Children with Potentially Conflicting Interests[.]

160 Md. App. at 638. Holding that there was "no merit" in the contention, Chief Judge Murphy elaborated.

> While it is true that there are situations in which a separate Guardian Ad Litem should be appointed for each child, the case at bar does not present a situation in which there is a potential conflict between the best interest of one child and the best interest of another child. Should such a conflict arise in the future, we are confident that (1) the Guardian Ad Litem will bring that fact to the court's attention, and (2) the court will take appropriate action.

160 Md. App. at 639.

The appellant was not mollified. On November 21, 2005, she filed a Motion to Remove the Guardian Ad Litem. She had earlier opposed Ms. Fogel's motion for an award of fees and costs. She now contends that Judge Nichols abused his discretion by failing to rule on her motion before making his decision of December 27, 2005.

Our answer to the contention is two-fold. In the first place, we hold that Judge Nichols did make an implicit ruling. In Frase v. Barnhart, 379 Md. at 116, the Court of Appeals placed its imprimatur on the phenomenon of denying a motion by implication.

> It has long been recognized, in Maryland and elsewhere, that motions may be denied by implication. In Wimberly v. Clark Controller Co., 364 F.2d 225, 227 (6th Cir. 1966), the court noted

> that " [w]hile it is certainly the better practice to specifically rule on all pending motions, the determination of a motion need not always be expressed, but may be implied by an entry of an order inconsistent with the granting of the relief sought."

(Emphasis supplied).

In this case, Judge Nichols was not unaware of the motion. At the hearing on November 27, 2005, counsel for the appellant reminded him of the motion just before the noontime break. Judge Nichols responded, "Well, I'll try and have the motion brought up here after lunch if we can find it. I can take a look at it." After the break, the appellant made no further request for a ruling and no inquiry about the court's review. As Judge Nichols placed his findings on the record, he gave credence to two observations that had been made by Ms. Fogel. He then responded to her request for a further ruling by rendering his decision on visitation with respect to the two daughters. Implicitly, Judge Nichols denied the motion, as he recognized Ms. Fogel's role in the proceedings.

Our second response to this contention is that all of this does not make any difference. The appellant fails to show us how she was prejudiced in any way. The only assertion in that regard is the bald conclusion that the "court . . . expressly noted in issuing its final ruling that it was relying heavily on the attorney's recommendations: 'I think that the Guardian Ad Litem is correct.'"

The judge's full statement was:

> I think that the Guardian Ad Litem is correct when she says that this child [Patrick] needs stability as do the other two children.

Finding that self-evident truism to be correct is as unremarkable as finding to be correct someone else's

statement that the world is round. The statement came, moreover, in the course of a ruling, granting the appellant visitation with Patrick, that went in the appellant's favor. On this contention, the appellant is simply refighting an ancient battle on an issue that is completely peripheral. We see no error.

Visitation With Katrina and Victoria

The appellant's final contention is that Judge Nichols's failure to give the appellant any visitation privileges with Katrina and Victoria was "in direct contravention of this Court's instruction in Koffley and must be reversed."

In Koffley, however, this Court issued no such instruction. We continued in effect, as a pendente lite order, the ban on all visitation until Judge Nichols got the opportunity to consider the merits of the visitation issue. We by no means prejudged what his decision should be. In making one decision with respect to Patrick and a different decision with respect to Katrina and Victoria, he carefully considered the merits.

As we have already pointed out, moreover, Katrina will be emancipated within weeks of the rendering of our decision in this case. As far as Victoria is concerned, the appellant does not even argue the merits of the decision, and we, therefore, need not summarize the evidence supporting the decision of Judge Nichols. The appellant only contends that this Court, in Koffley v. Koffley, directed that visitation be awarded. We did no such thing. The contention collapses with the collapse of its supporting predicate.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN M. KOFFLEY,	:	
Plaintiff	:	
v.	:	Case No.: CAD 96-08217
JOSEPH J. KOFFLEY, JR.,	:	
Defendant	:	

ORDER

Having conducted further proceedings following the mandate of the Court of Special Appeals vacating the visitation provisions of this Court's previous order, and converting the same to a pendente lite order and further upon consideration of Plaintiff/Counter-Defendant's Petition for Modification of Custody and Opposition thereto, and testimony having been taken before this Court on July 14, 2005, August 26, 2005, October 27, 2005, and November 29, 2005, and the Court having made certain findings of fact on the record in open Court, it is, this 27th day of December 2005, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that Plaintiff/Counter-Defendant's Petition for Modification of Custody be and is hereby denied; and, it is further

ORDERED, that Defendant/Counter-Plaintiff, JOSEPH JOHN KOFFLEY, JR., shall remain as the sole legal and physical guardian of the three (3) minor children of the parties, namely KATRINA KOFFLEY, PATRICK KOFFLEY, and VICTORIA KOFFLEY; and, it is further

ORDERED, that beginning with the month of December, 2005, the Plaintiff/Counter-Defendant shall have visitation with the minor child, PATRICK KOFFLEY, on

the first full weekend of each month from Saturday and 9:00 a.m. until Sunday at 6:00 p.m.; if the first of the month falls on a Saturday, that weekend shall constitute the first full weekend of that month; if the first of the month falls on a Sunday, the first full weekend shall begin the following Saturday; and, it is further

ORDERED, that the Plaintiff/Counter-Defendant shall also have visitation with her minor son, PATRICK, during the 2005 Christmas holiday from December 25, 2005, at 6:00 p.m. until Wednesday, December 28, 2005, at 6:00 p.m.; and, it is further

ORDERED, that the Plaintiff/Counter-Defendant shall be solely responsible for all transportation with respect to visitation with her son PATRICK; and, it is further

ORDERED, that Plaintiff/Counter-Defendant's request for visitation with the minor daughters, KATRINA and VICTORIA, is hereby denied at this time; and, it is further

ORDERED, that the issues of attorney's fees for the Defendant/Counter-Plaintiff, JOSEPH JOHN KOFFLEY, JR., and for the Guardian Ad Litem, JO BENSON FOGEL, Esquire, be and are hereby reserved pending a resolution of Plaintiff/Counter-Defendant's Chapter 7 Bankruptcy proceeding filed in the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division.

/s/ C. Philip Nichols, Jr.
Judge C. Philip Nichols, Jr.

APPROVED AS TO FORM AND CONTENT:

_____
William Ray Ford, Esquire
Attorney for Plaintiff/Counter Defendant

/s/ Lawrence A. Marzetti
Lawrence A. Marzetti
Attorney for Defendant/Counter-Plaintiff

/s/ Jo Benson Fogel/L.A.M.
Jo Benson Fogel, Esquire
Guardian Ad Litem for Minor Children

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN KOFFLEY,

Plaintiff,

v. Case No. CAD 96-08217

JOSEPH KOFFLEY,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

Upper Marlboro, Maryland
Friday, November 27, 2005

BEFORE:
HONORABLE JUDGE NICHOLS

[p. 154] * * *

FINDINGS OF THE COURT

THE COURT: I'm going to read the last paragraph of the remand order from our Superior Court. "In order for custody and visitation issues to be resolved in the best interests of the children who are the subjects of those proceedings it is important that the Court conduct those proceedings in a way that the party who disagrees with the Court's decision will nonetheless understand that in the words of Maryland Rule 5-102, the proceedings have been justly determined. As we stated above, we are persuaded that the circuit court did not abuse it's discretion in denying the appellant's motions for recusal. We emphasize, however, that it would not be an abuse of discretion for the Circuit Court to conclude that the case at bar has reached the point at which the interests of the parties and the children would be best served if a different judge conducts further proceedings required by this opinion." It's then brought this

case to me.

My heart goes out to everybody involved. This could be the most litigious case in this court and perhaps in this state at this point with the number of days spent on [p. 155] custody and visitation issues that it has been and probably a tribute to the system, they were able to devote that kind of time and attention to children within our jurisdiction. At least I hope it is and it's something we try very hard to do.

Ms. Keuthan's efforts, however well-intentioned, frequently impacted negatively on her children and the relationship between her former spouse and their ability to parent if not together, certainly apart to the point where custody is and should remain with the father. And I see no reason to change that. I think my colleagues in this chair, Judges Kasula and Dawson made the appropriate and proper decision in that regard and I'm going to continue the father as the primary custodial parent and grant him custody of the children.

The issue is one of visitation now. I have spoken with Patrick privately after a request of the parties without a transcript. It's clear from what you've told me that you know, his desire is to be with his mom. I really don't think it's in his best interest. I have weighed all the factors that Maryland law requires me to weigh. And certainly that one and what's in the best interest of the child. I think that the Guardian Ad Litem is correct when she says that this child needs stability as do the other two children. All three need a stable place. A place they'll know that it is theirs and it will continue that way and I think that's true [p. 156] for whatever years they have left.

I do recognized that he needs to have a relationship with his mom and he desperately wants one. I'm going to increase the visitation. Now I know that the very first day that we heard this case, Ms. Keuthan stood up and basically told me that, or had her lawyer tell me that she was

dissatisfied with what I did. Frankly everything that this Court has done has not met her satisfaction as near as I can tell and no matter how much time or attention or thought or honest feeling goes into it, she was never satisfied. And I understand that. I'm going to let her visit with Patrick one weekend a month and it will start on Saturday morning at 9 o'clock and conclude Sunday evening at 6:00 and she'll make the transportation arrangements to do that. I think that in his best interests and maybe this will be beneficial to him and perhaps to her.

As the Guardian Ad Litem has said, she had devoted most of her time and attention to litigation of this case. I think that's true. There are other practical things in life that should take our time up, from getting kids to soccer, to ice-skating, to whatever else that they do, and when you devote this much attention, time, and energy, and literally tens of thousands of dollars to the litigation, something has to bend and to give and sadly I think the best interests of the children gave in this case by what's transpired. If ever [p. 157] there was the nuclear option exercised, certainly it's this case. Everything that could be raised has been raised from abusing the children to just generally taking advantage of the situation to the mom getting arrested for kidnapping to you name it. It's just a very sad event. My heart goes out to all of you. Maybe someday something good will come of all this and we can look back and hopefully the children will have a childhood that they can at least have some fond memory of.

In any event I'll reserve on the issue of attorney's fees until the conclusion of the bankruptcy proceedings. I'll ask Mr. Marzetti to draw the order. Father remains as custodial parent, has custody of the child or children. Patrick will get to see his mom on the first full weekend of each month from Saturday at 9:00 till Sunday at 6:00. She'll make arrangements for the transportation and we'll reserve on the issue of attorneys fees. Do I need to reserve on the

issue of the Guardian Ad Litem's fees as well or can I do that today? I need to have that reserved or?

MS. FOGEL: Yes, Your Honor, (indiscernible).

THE COURT: We'll continue the reservation there. Are there any –

MS. FOGEL: With regard to Victoria and Katrina (indiscernible) in regards to –

THE COURT: Well, let me get around to that. [p. 159] That's, you're right. Once there is some recommendation from you that we need to address the visitation issue as put to you by the child's current mental health care professional, I'll address that issue. Once someone in a position as a health care provider suggests that it would be in the child's best interest to do that, we'll certainly take another look at it. I don't know that it's happened to the point where I'm satisfied it's in their best interest yet.

* * *

II. Material Pursuant To Rule 14(1)(i)(ii)

REPORTED - 160 Md.App. 633, 866 A.2d 161

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 46, 910

September Term, 2004

LYNN M. KOFFLEY

v.

JOSEPH J. KOFFLEY, JR.

Murphy, C.J.
Kenney, J.
Eyeler, Debora S., JJ

Opinion by Murphy, C.J.

Filed: January 25, 2005

The parties to these combined appeals from the Circuit Court for Prince George's County-Lynn M. Koffley, appellant, and Joseph J. Koffley, Jr., appellee-were married on May 28, 1988, and were divorced by a judgment of absolute divorce signed on December 20, 1999 and docketed on December 27, 1999. They are the parents of a sixteen year old daughter, a fourteen year old son, and an eleven year old daughter. Their failure or refusal to agree on what is in the best interest of their children has resulted in an enormous amount of litigation, including (1) nine contempt petitions filed by the appellant, (2) seven contempt petitions

filed by the appellee, (3) the combined appeals that we address in this opinion, (4) several other appeals to this Court, (5) Protective Order proceedings in the District Court of Maryland for Prince George's County, and (6) proceedings in the United States Bankruptcy Court for the Eastern District of Virginia.

As a result of the orders that we review in these combined opinions, (1) the appellee has been awarded custody of the children, (2) the appellant's right to visitation has been "suspended," and (3) further circuit court proceedings are scheduled to take place on February 18, 2005. Subsequent to oral argument in No. 46, the appellant filed with this Court an "Emergency Motion to Immediately Vacate Custody and Visitation Orders and to Transfer Custody of Patrick to Appellant." This motion included the assertion that, because the present custody and visitation orders are "on appeal," the circuit court has been divested of jurisdiction to change any of the provisions in those orders. According to the appellant, unless and until this Court reverses or vacates the orders at issue, the circuit court does not have jurisdiction to order a change in custody.

Relevant Factual Background

In June of 1997, the circuit court entered an order granting "sole" custody of the children to the appellee, and awarding visitation to the appellant. In October of 1997, the circuit court entered a *pendente lite* order directing the appellant to pay $1,644.77 per month in child support. This order included the provision that the appellant's support obligation would "remain in full force and effect until superseded by further Order of court." Although the parties were before the circuit court on numerous occasions in 1998, 1999, 2000, 2001, 2002, and 2003, the appellant's right to visitation was not "suspended" until February 13, 2004, on which date the circuit court entered a FORTHWITH ORDER that is at issue in Case No. 46. The *pendente lite* support order was not superseded until the conclusion of a

June 21, 2004 hearing, following which the circuit court entered the orders at issue in Case No. 910. The appellant argues that the circuit court erred and/or abused its discretion in entering several orders, including orders providing:

> that all visitations between the [appellant] and the involved three minor children, be ... **SUSPENDED** ...; that Judgment be ... awarded against the [appellant], in favor of the [appellee] in the amount of $16,141.25 as and for a contribution toward [the appellee's] counsel fees in these proceedings; that the [appellant] ... is hereby found to be in arrears in child support as of June 18, 2004, in the amount of Four Thousand Five Hundred Fifty-One Dollars and Forty Seven Cents ($4,551.47); that the [appellant's] Motion to Modify the amount of child support be ... denied; and that a rehearing on the issue of the [appellant's] right to visit with her children be ... scheduled for February 18, 2005, at 9:00 a.m., at which time the three (3) minor children shall be present.

In light of the appellee's agreement that the appellant should be granted some type of "supervised" visitation with the children, the order "suspending" her visitation must be vacated. We shall therefore direct (1) that the order that presently controls the appellant's right to visitation be converted to a *pendente lite* order until the parties are once again before the circuit court, and (2) that further proceedings in the circuit court adhere to the procedure required by *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114 (2003). Because the appeal of a custody order does not divest the circuit court of jurisdiction to enter a "new" custody order upon proof that, as a result of a material change in circumstances, a change of ***638** custody is in the child's best interest, we shall deny the "Emergency Motion" that the appellant has filed in this Court. We shall otherwise affirm the judgments of the circuit court.

Appellant's Arguments as to the Orders Entered on February 13, 2004 and June 21, 2004

In No. 46, the appellant argues that:

1. The Judge Should Have Recused Himself When His Failure to Timely Adjudicate a Parent's Earlier Claims Caused Him to Have a Personal Stake in Ruling Against Her in a Larter [sic] Custody Proceeding[.]

2. The Judge Abused His Discretion When He Sua Sponte Schedule[d] a Custody Hearing and Terminated All Visitations Between a Parent and Her Children Based on Complaints He Had Previously Rejected[.]

3. The Judge Erred as a Matter of Law by Requiring a Parent to Testify Whether Her Children Had Lied About Disputed Events[.]

4. The Judge Erred by Engaging a Single Attorney Without Any Guidance to Represent Three Children with Potentially Conflicting Interests[.]

5. The Judge Erred by Refusing to Consider Psychological Testimony Concerning the Children's Estrangement from Their Mother[.]

In case No. 910, the appellant argues that:

1. The Order of Court entered 1 July 2004 should be reversed as a consequence of the trial judge's prior refusal to recuse himself.

2. The trial court violated appellant's right to due process in extending the suspension of her right of visitation indefinitely without taking evidence.

3. The trial court violated due process by failing to decide appellant's motion to modify child support for 57 months.

4. The court erred in assessing child support arrears based on a disputed proffer from the father's counsel.

5. The court erred in distributing marital property in violation of a federal bankruptcy stay.

Appellant's "Recusal" Arguments

There is no merit in either recusal argument, which is based upon the fact that the appellant wrote a letter of complaint to the Chief Judge of the Court of Appeals, in which she complained that the circuit court had failed to decide issues that should have been decided more promptly. As both of the appellant's counsel conceded during oral argument, the fact that a litigant has made a complaint against the trial judge does not require that the trial judge grant the litigant's recusal motion. To hold otherwise would vest every dissatisfied litigant with the power to recuse the trial judge.

Appellant's "Procedural" Arguments

The appellant argues that the circuit court abused its discretion by (1) "sua sponte" scheduling a custody hearing, (2) questioning appellant about the accuracy of information supplied by the children, and (3) appointing only one attorney to serve as *Guardian Ad Litem* for the parties' three children. There is no merit in any of these arguments. Both parties had ample time to prepare for the hearing. While it is not particularly useful to question a witness about the accuracy of information provided by some other person, such questioning does not constitute reversible error. *See Fisher v. State,* 128 Md.App. 79, 152-53, 736 A.2d 1125 (1999), *aff'd,* 367 Md. 218, 786 A.2d 706 (2001). While it is true that there are situations in which a separate *Guardian Ad Litem* should be appointed for each child, the case at bar does not present a situation in which there is a potential conflict between the best interest of one child and the best interest of another child. Should such a conflict arise in the future, we are confident that (1) the *Guardian Ad Litem* will bring that fact to the court's attention, and (2) the court will take appropriate action.

Appellant's "Financial" Arguments

While we do not disagree with appellant's contention that the child support and marital property issues should have been decided more promptly, because the record includes evidence that is sufficient to support the factual findings at issue, we are not persuaded that the circuit court erred or abused its discretion in resolving those issues. While appellant's recusal arguments present the question of whether these issues should have been resolved in the first instance by a different circuit court judge, because of our holding that there is no merit in the recusal arguments, we affirm the child support and marital property rulings at issue in these appeals.

Appellant's "Due Process" Arguments

The appellant also argues that the circuit court abused its discretion by (1) refusing to receive expert testimony about the children's "estrangement" from their mother, and (2) "terminating" *all* visitations, pending a "rehearing on [that] issue." These arguments are moot in light of (1) the appellee's agreement that the appellant is entitled to *some* type of visitation, and (2) the hearing that is presently scheduled for February 18, 2005, at which the circuit court is hereby directed to apply the procedure set forth in *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114 (2003), in which the Court of Appeals noted its "disagreement with the procedure ... of ... subjecting [the appellant-mother] to periodic review hearings." *Id.* at 120, 840 A.2d 114. As the *Frase* Court explained:

> It is common-and in some instances required-for juvenile courts, in dealing with children who have been found in need of assistance (CINA), to have periodic review hearings to monitor the progress of the child, the child's parents, and any other guardian or potential custodian. In that setting, of course, the child has already come under the direct

jurisdiction and supervision of the court and may well be in the legal custody of the court. By statute, the court's comprehensive jurisdiction extends until either the child turns 21 or the jurisdiction is affirmatively terminated by the court. *See* CJP § 3-804(b). The context, which justifies the direct and continuing supervision of the court, is that, as part of the CINA finding, the court has determined that court intervention is required to protect the child's health, safety, and well-being. *See* CJP § 3-801(f) and (m).

The court's role is different in a normal private custody dispute. It is to take evidence and decide the dispute, so that the child and the other parties can get on with their lives. The court does not retain jurisdiction until the child turns 21, or even 18. Although the matter of custody, visitation, and support may always be reopened upon a showing of changed circumstances, the court's jurisdiction over the particular dispute ends when the dispute is resolved, which the law anticipates will occur within a reasonable time after the evidentiary hearing. Those kinds of cases are not to be strung out indefinitely, as though they were CINA cases.

For good cause, the court may hold a case open for a reasonable period to consider additional evidence, not available at trial but which the court finds necessary to a proper decision. What it may not do, however, is to proceed to make findings that would dictate a particular result and then ... to continuing review hearings. When it does that, the case never ends; the child and the parties remain under a cloud of uncertainty, unable to make permanent plans. The court seemingly reserves the power to alter the custody arrangement at any time, even in the absence of a new or amended petition,

> based on a later review of circumstances known or predicted to exist at the time of the initial determination. That is procedurally impermissible.

Id. at 120-23, 840 A.2d 114. The visitation provision at issue in the case at bar is hereby converted to a *pendente lite* order that will remain in effect until the parties are once again before the circuit court.

Jurisdiction of the Circuit Court to consider an "Emergency" Motion for Change of a Custody Order filed by a Party at a Time when an Appeal from that Custody Order is Pending in this Court or in the Court of Appeals

> Any custody decision is an exception to the general rule that only a final judgment may be appealed. That is, a decree as to the custody of a child is never absolutely final because it is always subject to modification and change under the continuing jurisdiction of the divorce court. However, it is final in the sense that it is not interlocutory, and is conclusive, of the facts in evidence at the time it was rendered.
>
> * * *
>
> Courts differ on the question of whether an appeal deprives the trial judge of jurisdiction to consider a motion dealing with the child's custody. Some courts hold the trial court lacks jurisdiction to deal with a motion subsequent to the notice of appeal.... Other cases hold that (even if a supersedeas bond is given) the trial court does not lose jurisdiction to make a temporary custody order pending appeal upon pleading and proof that the children's welfare was substantially endangered during that period.... The appeal does not transfer to the distant appellate court the continuing jurisdiction over the child's welfare.

Sandra Morgan Little, *Child Custody and Visitation, Law and Practice,* Custody § 26.03[1], Appeals § 26.04[1] (2004).

We are persuaded that the appeal of a custody order does not divest the circuit court of jurisdiction to decide the merits of a claim that, as a result of a *material* change in circumstances that has occurred *after* that order was entered, a change in custody is in the child's best interest. We therefore hold that the appellant's "Emergency Motion to Immediately Vacate Custody and Visitation Orders and to Transfer Custody of Patrick to Appellant" should have been presented to the circuit court in the first instance. This holding is entirely consistent with the above quoted holding in *Frase, supra,* as well as with several opinions of this Court, including *Wagner v. Wagner,* 109 Md.App. 1, 674 A.2d 1 (1996), *Shunk v. Walker,* 87 Md.App. 389, 589 A.2d 1303 (1991), *Link v. Link,* 35 Md.App. 684, 371 A.2d 1146 (1977), and *Garland v. Garland,* 22 Md.App. 80, 321 A.2d 808 (1974).

In *Wagner, supra,* while summarizing "the procedural steps required to be taken in child custody modification cases," this Court expressly stated that "[the] threshold-but not paramount-issue is the existence of a material change," and "the circumstances to which change would apply would be the circumstances known to the trial court when it rendered the prior order ... [or] not known to the court because evidence relating thereto was not available to the court." 109 Md.App. at 28-31, 674 A.2d 1. It is clear from the procedure summarized in *Wagner* that, although the party moving for modification must prove that there has been a material change in circumstances, that party is not prohibited from litigating the issue on the ground that the prior order has been appealed.

In *Shunk, supra,* this Court affirmed a "modification of a custody award that transfer[red] custody of the child from the 'custodial' parent to the 'visitor' parent." 87

Md.App. at 397, 589 A.2d 1303. In that case, the initial award of custody was included in a judgment of divorce entered on October 27, 1988, and the petition to modify custody was filed on April 6, 1990. *Id.* at 393-94, 589 A.2d 1303. This Court noted that, although appellant argued that "there was no justification for the chancellor's ruling,"

> Appellant does not contest the jurisdiction of the court in modifying its previous custody order. The court retained jurisdiction by virtue of Md.Code (1984), Fam.Law Art. § 9-204(a)(1)(ii).

Id. at 395 n. 2, 589 A.2d 1303.

In *Garland, supra,* while affirming the circuit court's decision that appellant was in contempt of a decree of divorce, even though (1) appellant had noted an appeal from that decree, and (2) the appeal was pending when appellant was held in contempt, this Court stated:

> It is not contended that the lower court lacked jurisdiction because the appeal from the divorce decree was pending; however, we will briefly discuss this question. Finding changed circumstances, [the circuit court] modified the divorce decree by altering the amount of the support payments for the children. The cases have held that the trial court can modify the alimony payment provisions of a divorce decree with respect to matters which arise after the passage of the decree and while an appeal therefrom is pending. It would seem by analogy that the trial court would have the power, pending an appeal, to modify the support payment provisions of a divorce decree in the event of changed circumstances which arise subsequent to the original decree. (Internal citations omitted).

22 Md.App. at 85, 321 A.2d 808.

In *Link, supra,* this Court rejected the contention of

the former husband/appellant that, because he had filed ar appeal from the judgment of divorce, the circuit court did no have jurisdiction to hold him in contempt for his refusal tc comply with the alimony and counsel fee provisions of the judgment. We stated:

> Appellant's argument is based upon the theory that once an appeal has been noted the lower court is without jurisdiction to take any further action in the case until the appeal is decided, and that the court below was thus without jurisdiction to find him in contempt for violating the decree which was being appealed. The general rule, indeed, is that the noting of an appeal divests the lower court of jurisdiction to proceed with regard to the issue appealed. *See, e. g., Lang v. Catterton,* 267 Md. 268, 297 A.2d 735; *Visnich v. Wash. Sub. San. Comm.,* 226 Md. 589, 174 A.2d 718; *Collier v. Collier,* 182 Md. 82, 32 A.2d 469. But like all rules, it is not without its exceptions. While there appears to be no Maryland decision squarely on the issue here, a number of cases are so closely related.... Presumably the lack of direct authority derives from the generally understood premise upon which we hold jurisdiction to be founded, *i.e.,* the inherent authority of a court to enforce its decrees subject only to an express stay.
>
> * * *
>
> Maryland cases have uniformly held that a divorce court has jurisdiction to entertain [the wife's] petition for alimony, child support and counsel fees, even though her petition is filed after an appeal from the grant or denial of a divorce has been noted.... Furthermore, the chancellor retains jurisdiction to modify alimony even after an appeal has been taken. *Lewis v. Lewis,* 219 Md. 313, 149 A.2d 403; *Hornstein v. Hornstein,* 195 Md. 627, 75

A.2d 103.

* * *

> If a court is allowed to award and modify alimony, child support and counsel fees pending an appeal, there is no reason why it cannot enforce its decree.

35 Md.App. at 686-88, 371 A.2d 1146 (Internal citations omitted).

For the above stated reasons, there is no reason why the appeal of a custody order divests the circuit court of jurisdiction to decide the merits of a claim that a change of custody is in the best interest of the child whose custody order is at issue in the pending appeal, *provided that* the motion for change of custody pending appeal is based upon the assertion of a material change in circumstances that has occurred subsequent to the entry of that order.

Revisiting the Recusal Issue

Rare are the cases in which a Family Division judge should grant a motion for recusal on the ground that, as a result of prior rulings in an ongoing domestic relations case, the judge has become "prejudiced" against the party who has moved for the judge's recusal. In "family law" cases, however, parties are often overcome by emotion when they are disappointed by an adverse custody or visitation ruling (or by the judge's considered decision to hold a matter *sub curia* in the hope that the adverse parties will, while the ruling is pending, act in the best interest of their children). There is, unfortunately, no test that can establish to a scientific certainty when it is appropriate for a different judge to resolve "new" custody and/or visitation issues that arise in a Family Division case that is unlikely to conclude before all of the parties' children become emancipated.

In order for custody and visitation issues to be resolved in the best interest of the children who are the

subjects of those proceedings, it is important that the court conduct those proceedings in a way that the party who disagrees with the court's decision will nonetheless understand that, in the words of Maryland Rule 5-102, the "proceedings [have been] justly determined." As we stated above, we are persuaded that the circuit court did not abuse its discretion in denying the appellant's motions for recusal. We emphasize, however, that it would not be an abuse of discretion for the circuit court to conclude that the case at bar has reached the point at which the interests of the parties and the children would be best served if a different judge conducts the further proceedings required by this opinion.

ORDER SUSPENDING APPELLANT'S VISITATION VACATED AS A "FINAL" ORDER AND CONVERTED TO A *PENDENTE LITE* ORDER; JUDGMENTS OTHERWISE AFFIRMED; CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION; APPELLANT TO PAY 90% OF THE COSTS; 10% OF THE COSTS TO BE PAID BY APPELLEE; MANDATE TO ISSUE FORTHWITH.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3042

September Term, 2002

LYNN M. KOFFLEY

v.

JOSEPH J. KOFFLEY, JR.

Hollander, J.
Sonner, J.
Moylan, Charles E., Jr.,
(retired, specially assigned), JJ

Opinion by Sonner, J.

Filed: May 13, 2004

This appeal arises from a hearing in the Circuit Court for Prince George's County, in which the court found appellant, Lynn M. Keuthan,[1] in contempt for failure to pay child support as directed, and appellee, Joseph J. Koffley, Jr., in contempt for failure to comply with visitation orders. The court ordered Ms. Keuthan to pay her arrearage in child support, and to make regular child support payments. It ordered Mr. Koffley to comply with the visitation orders.

---

[1] On December 10, 1999, the court granted Ms. Koffley's request to restore her maiden name Keuthan. Therefore, we will refer to appellant throughout this opinion as Ms. Keuthan.

The court then imposed a forty-five-day prison sentence on Ms. Keuthan, and stayed it pending payment of arrearages by December 31, 2002. It sentenced Mr. Koffley to ninety days' incarceration, and stayed it pending compliance with the visitation orders. The parties present seven questions for our review, which we summarize below:

I. Are the issues related to contempt properly before this Court?

II. Did the court err in finding Ms. Keuthan and Mr. Koffley in contempt by failing to comply with the procedural safeguards required by Maryland Rule 15-206?

III. Did the court err in finding Ms. Keuthan in contempt by failing to properly apply Maryland Rule 15-207(e)?

IV. Did the court err in appointing a guardian *ad litem*?

For the reasons that follow, we dismiss the appeal in part, and otherwise affirm the judgment.

Background

For almost eight years, Lynn M. Keuthan and Joseph J. Koffley, Jr. have enlisted the judicial system to resolve issues related to child support and visitation. During that time, they amassed twenty-nine pages of docket entries, made over 100 court filings, and subjected each other to dozens of court orders. They caused the "alienation of [their] children," Katrina, Patrick, and Victoria, and their children have expressed their anger in unsolicited letters to the court. To support their litigation, Ms. Keuthan and Mr. Koffley each incurred significant legal fees. One of the judges below noted that "you can either educate your children or "you can educate your attorney's children . . . [T]hat you all have incurred nearly $100,000 in legal fees individually tells me that you all have been concerned about sending your attorney's children to school."

This litigation began on April 11, 1996, when Ms. Keuthan filed a complaint for limited divorce. Seven days later, Mr. Koffley filed a counter-complaint for limited divorce, custody, and other relief. The court bifurcated the issues of custody and visitation for trial. On May 29, 1997, the court awarded sole custody of the three children to Mr. Koffley, and it granted extensive visitation to Ms. Keuthan. The court did not address the issue of child support.

On July 14, 1997, Mr. Koffley filed an amended complaint for an absolute divorce, to which Ms. Keuthan filed an amended, supplemental counter-complaint for divorce on September 10, 1997. She requested that "child support be determined based on the shared custody arrangement" because she had the children overnight for more than 128 nights of the year.

Following a hearing, a domestic relations master entered a *pendente lite* order on October 23, 1997, directing Ms. Keuthan to pay $1,644.77 per month in child support. The order provided that it would "remain in full force and effect until superseded by further order of this court."

Four days later, Ms. Keuthan filed exceptions to the master's recommendations. They included, *inter alia*, exceptions to the amount awarded based on sole, rather than shared custody, the children's tuition, and child care. On June 18, 1998, the court overruled each of these exceptions.

About a year-and-a-half later, Ms. Keuthan filed another challenge to the child support order, this time based on changed circumstances. She argued that she had shared custody because the children had spent twenty-six consecutive days with her in August 1999, that child care expenses had decreased because there were no expenses for half of July or for the twenty-six days of August that the children lived with her, and that Mr. Koffley's income had increased significantly since October 1997. She also sought credit for overpayment of child support.

After hearing motions and stipulations on December 10, 1999, the court instructed them to submit proposed facts and findings by February 29, 2000. The court, *nunc pro tunc* to December 10, 1999, granted them an absolute divorce on December 20, 1999.

Three months later, on March 10, 2000, the court again heard arguments, *inter alia*, on the amount of child support. Ms. Keuthan argued that the order of absolute divorce modified and expanded visitation to provide that the children would reside with her an additional one or two nights each month when Mr. Koffley traveled out of town on business. She argued that, nevertheless, she was entitled to a reduction in child support based on shared, rather than sole, custody because the children slept at her house for more than thirty-five percent of the year. She also argued that because their incomes had changed, the appropriate level of support should be $427 per month. Finally, she sought to make the reduction retroactive to October 1999, the date of her original motion to amend the child support award based on changed circumstances. Mr. Koffley argued that the issue of shared custody was *res judicata*, since the court overruled Ms. Keuthan's original exceptions to the master's recommendations for child support.

The court concluded the hearing on March 10, 2000, by stating that, in granting an absolute divorce, it "did not, in fact, change [the court's] order." The court announced that it would issue a written opinion within thirty days. No opinion ever issued.

On November 5, 2001, counsel appeared, once again, for argument on the unresolved issues, including child support. Ms. Keuthan argued that she had overpaid $21,000 in child support since October 1999, and requested that child support be adjusted to $1,028 per month. The court set disposition for December 5, 2001. No order ever issued. Ms. Keuthan and Mr. Koffley continued to file motions.

Ms. Keuthan declared bankruptcy under Chapter 13, and her plan for reorganization was accepted in early 2002. On August 2, 2002, Ms. Keuthan filed a motion to advance any hearing date on her motions. Her motion alleged that child support payments forced her into bankruptcy, and that she was entitled to, at least, a $30,000 retroactive reduction in child support payments. Then, on August 5, 2002, Ms. Keuthan quit her job with the federal government.

On October 11, 2002, Mr. Koffley filed a motion to cite Ms. Keuthan in contempt. He asserted that Ms. Keuthan demonstrated contempt by failing to make child support payments since August 16, 2002, and by voluntarily terminating her employment. He sought incarceration as a sanction. On October 31, 2002, the court directed Ms. Keuthan show cause why the relief requested should not be granted.

At the hearing on December 16, 2002, Ms. Keuthan received at least five opportunities to explain why she quit her job when she had child support obligations and no other source of income. When the court asked Ms. Keuthan if she was able to take the vacation that she had planned in August before quitting her job, she answered, "yes." When her counsel asked her to explain why she quit her job, she responded, "I wasn't able to take that time with my children, and have the time with my children, and have the vacation that I had been trying to have, and, you know, being disappointed for the last five years of not being[.]" Ms. Keuthan also explained that she quit her job with the expectation of obtaining consulting work, but she did not find it. At the time she quit her job, she had accumulated approximately two weeks of sick leave, and three weeks of annual leave.

The court subsequently held Ms. Keuthan in contempt, ordered her to pay a portion of attorney's fees and the balance of the child support that she owed, and sentenced her to forty-five days' incarceration if she did not pay the full

amount of child support by December 31, 2002. The court stated:

> I have serious questions about credibility. I have heard the testimony of Ms. Koffley, I have no idea of what I believe or disbelieve about her employment situation, income situation, or what is going on. I have no idea whether what she portrays to the court of what happened . . . in fact happened but I know she has money to continue to come to court.

The court also held Mr. Koffley in contempt for denial of visitation. It noted, "the defendant is using the children to get to the mother, and trying to harm, tarnish her in whatever way he can." It imposed a ninety-day sentence, suspended on the condition that Mr. Koffley comply with the visitation order. The court also appointed a guardian *ad litem*.

Discussion

I.

We cannot rule upon the issues raised by Ms. Keuthan and Mr. Koffley related to contempt because there has been no entry of final judgments. To constitute a "final judgment," a ruling of the court must have at least three attributes:

> (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make proper record of it in accordance with Md. Rule 2-601.

Short v. Short, 136 Md. App. 570, 576-77 (2001) (citing *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989)). The

recording statute specifies:

> (a) **Prompt Entry-Separate Document.** Each judgment shall be set forth on a separate document. . . . A judgment is effective only when so set forth and when entered as provided in section (b) of this Rule. . . .
>
> (b)**Method of Entry-Date of Judgment.** The clerk shall enter a judgment by making a record of it in writing on the file jacket, or on a docket within the file, or in a docket book, according to the practice of each court, and shall record the actual date of the entry. That date shall be the date of the judgment.
>
> (c)**Recording and Indexing.** Promptly after entry, the clerk shall (1) record and index the judgment . . . and (2) note on the docket the date the clerk sent copies of the judgment in accordance with Rule 1-324.

Md. Rule 2-601.

In addition to these substantive and procedural requirements for a final judgment, the rule governing constructive civil contempt also directs the trial court to "issue a written order that specifies (A) the amount of the arrearage for which enforcement, by contempt is not barred by limitation, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged. . . ." Md. Rule 15-207(e)(4) (emphasis added).

In determining whether or not a final judgment has been entered, we must reference the trial court's docket entry. *See Waller v. Md. Nat'l Bank*, 332 Md. 375, 378 (1993); *Owings v. Foote*, 150 Md. App. 1, 8-9 (2002); Md. Rule 2-601(b). The docket entry dated January 27, 2003, reports, in relevant part:

> D/S HEARD 12-16-02 HEARING ON PENDING MOTIONS. . .THE COURT FINDS THE PLAINTIFF [HAS

> VOLUNTARILY] IMPOVERISHED HERSELF. THE COURT [FINDS] THE PLAINTIFF IN CONTEMPT. PLAINTIFF IS SENTENCED TO A PERIOD OF [INCARCERATION] FOR A PERIOD OF 45 DAYS [.] THE IMPOSITION OF THE SENTENCE IS STAYED [ON THE] CONDITION THAT $6270.00 IS PAID ON OR BEFORE 12-31-02. . . [PLAINTIFF'S] MOTION FOR CONTEMPT. . . [IS] GRANTED. [DEFENDANT] IS FOUND IN CONTEMPT AND FOUND IN WILLFUL VIOLATION OF [THE COURT'S] ORDER. [DEFENDANT IS SENTENCED TO] 90 DAYS FOR DENIAL OF VISITATION. [THE] COURT WILL STAY THE IMPOSITION . . . ORDER TO BE SUBMITTED BY COUNSEL MR. STEPHEN FRIEDMAN ESQ.

(Emphasis added).

We note that the "order [was] to be submitted by counsel." Our review of the record reveals no such order. Therefore, neither the requirements for a final judgment, the recording statute, nor the contempt statute was satisfied. *See* also *Owings*, 150 Md. App. at 8 ("Docket entries ending with statements such as 'order to be filed' or 'attorneys to prepare orders' certify that a ruling was not final."); *Osborn v. Bunge*, 338 Md. 396, 401 (1995) (holding that the judgment was not final because clerk wrote "order to be filed." even though the transcript of the summary judgment hearing reflected that the trial judge intended that the ruling be final).

A circuit court ruling is not appealable unless it constitutes a final judgment. *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1969); *Jenkins v. Jenkins*, 112 Md. App 390, 399 (1996) ("The longstanding rule in this State deems the existence of a final judgment as a jurisdictional fact prerequisite to the viability of an appeal."). "The policy underlying the final judgment doctrine is compelling. It is, therefore, strictly enforced." *Jenkins*, 112 Md. App at 409. Accordingly, we dismiss both Ms. Keuthan's and Mr. Koffley's appeals of their respective contempts.

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II.

We recognize that the parties may seek to secure a final judgment. Therefore, for the guidance of the court and the parties, we shall briefly address the parties' contentions. Even if we were presented with a final judgment, we would determine that the court could not enter a proper final judgment because of its failure to comply with Maryland Rule 15-206. In dealing with contempt, the Court of Appeals acknowledged:

> [I]t may be frustrating to judges . . . to have to deal with people who . . . seem to flaunt their defiance of properly entered court orders. Nonetheless, because a person's liberty is at stake and because it is a judicial proceeding, both the form and substance of due process and proper judicial procedure must be observed.

Thrower v. State, 358 Md. 146, 160-61 (2000) (citations omitted). Here, neither has there been an observance of procedure nor attention to efficiency.

A. Ms. Keuthan

Ms. Keuthan argues that the court forewent due process by failing to provide proper notification of her risk of incarceration, and by failing to include a copy of the motion that cited her in contempt with the show cause order. Even though Ms. Keuthan failed to object to the process at the time, we would exercise our discretion to review it because of the great importance of procedural safeguards. See Md. Rule 8-131(a).

The show cause order from October 31, 2002, informed Ms. Keuthan of her right to an attorney, but it did not inform her that incarceration was sought. Maryland Rule 15-205 (c) (2) (C) specifies:

> (I)f incarceration to compel compliance with the court's order is sought, a notice to the alleged

> contemnor in the following form [shall be included in the court's order]:
>
> TO THE PERSON ALLEGED TO BE IN CONTEMPT OF COURT:
>
> 1. It is alleged that you have disobeyed a court order, are in contempt of court, and should go to jail until you obey the court's order.
>
> 2. You have the right to have a lawyer. If you already have a lawyer, you should consult the lawyer at once. If you do not now have a lawyer, please note: . . .
>
> 3. IF YOU DO NOT APPEAR FOR A SCHEDULED PREHEARING CONFERENCE . . . YOU WILL BE SUBJECT TO ARREST.

The show cause order sent to Ms. Keuthan lacks the entire form and much of the substance required by Rule 15-206(c)(2)(C). *See Redmond v. Redmond*, 123 Md. App. 405, 417 (1998) (stating that a show cause order that failed to warn the alleged contemnor of the risk of incarceration did not satisfy the procedural requirements of 15-206(c)(2)(C)).

Ms. Keuthan did twice receive actual notice of the possibility of incarceration. The attorney for Mr. Koffley sent two letters with the "Motion for Contempt and Other Emergency Relief," one on October 7, 2002, and a second notice on November 7, 2002. The motion recommends an imposition of a suspended ninety-day sentence. Maryland Rule 15-206(d) requires:

> The order, together with a copy of any petition and other document filed in support of the allegation of contempt, shall be served on the alleged contemnor pursuant to Rule 2-121 or 3-121 or, if the alleged contemnor has appeared as a party in the action in which the contempt is charged, in the manner

prescribed by the court.

Although Mr. Koffley's attorney sent two copies of the motion, the court failed to comply with Rule 15-206(d).

B. Mr. Koffley

Mr. Koffley also argues that the court failed to satisfy any of the procedural requirements of Rule 15-206(c) before finding him in contempt. We agree. Indeed, the court did not even enter a show cause order. A show cause order is a prerequisite for compliance with the procedural safeguards of Rule 15-206. *See* Md. Rule 15-206(c)(2); *see also Reamer v. Reamer*, 246 Md. 532, 535 (1967) (reversing a finding of constructive contempt against a former husband who was never served with a copy of the show cause order or the petition).

III.

Next, Ms. Keuthan argues that any finding of contempt would be in error for three reasons. First, she contends that no support order existed after the divorce decree. Second, she asserts that the court incorrectly applied Maryland 15-207(e)(3), because it failed to make findings of fact that would support a contempt finding.[2] Third, she maintains the court erred in setting a purge amount without determining her present ability to pay it. We choose to discuss briefly each argument for the guidance of the court.

Ms. Keuthan's argument that the court's grant of an absolute divorce terminated the earlier support order is without merit. She cites *Payne v. Payne*, 73 Md. App. 473, 482 (1988), for the proposition that an order granting divorce terminates a *pendente lite* award of child support. *Payne*

---

[2] It appears that Ms. Keuthan's motion for reduction in child support has been pending for fifty months. The court heard arguments on the motion, *inter alia*, on at least four occasions, and yet no order has been issued.

held that a trial court need not find changed circumstances from the *pendente lite* award to change the child support award when granting an absolute divorce. *Id.* at 482-83; see also *Hill v. Hill*, 79 Md. App. 708, 710 (1989). In the case at bar, the divorce decree is totally silent on the issue of child support. The *pendente lite* order states that it "will remain in full force and effect until superseded by further Order of this Court." No court order has affirmatively superseded it. In fact, the court clarified this at the hearing on March 10, 2000, by stating that, in granting an absolute divorce, it did not, in fact, change [the court's] order." We decline to conclude that the *absence* of an order is sufficient to extinguish a *pendente lite* child support award.

Second, Ms. Keuthan contends that the court incorrectly applied Maryland Rule 15-207(e)(3), because it failed to consider her ability to comply with the support order and her attempts to gain employment. Maryland Rule 15-207(e)(3) is an exception to part (2) of the same Rule, which states, in relevant part, that "the court may make a finding of contempt if the petitioner proves by clear and convincing evidence that the alleged contemnor has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing." Ms. Keuthan offered testimony that she sent Mr. Koffley a money order for $125 through regular mail. Mr. Koffley offered testimony that Ms. Keuthan is under an order to pay $1,644.47 per month, and that she has failed to make appropriate payments since August 16, 2002. Thus, the court could have found that Mr. Koffley proved, by clear and convincing evidence, that Ms. Keuthan did not pay the amount owed.

In fact, at trial, Ms. Keuthan did not dispute the existence of the order, only her financial ability to comply with it. In part, Maryland Rule 15-207(e)(3) prohibits the court from finding a party in contempt

> if the alleged contemnor proves by a preponderance

> of the evidence that . . . . from the date of the support order through the date of the contempt hearing the alleged contemnor (i) never had the ability to pay more than the amount actually paid AMU (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment.

(Emphasis added). Without suggesting that Ms. Keuthan presented sufficient evidence to satisfy the first tenet of 15-207(e)(3), we would uphold the court's ruling of contempt, based on its finding of voluntary impoverishment. We explain.

Ms. Keuthan had at least five opportunities to explain why she quit her job when she had child support obligations and no other source of income. Her answers were evasive and sometimes difficult to understand from the record, the clearest one being, "I wasn't able to take that time with my children, and have the time with my children and have the vacation that I had been trying to have and, you know, being disappointed for the last five years of not being."

Apparently, reciting what it determined to be Ms. Keuthan's logic in quitting her job, the court concluded,

> "You are doing these things to make my life unhappy, I am going to make your life unhappy. I can't pay you if I don't have it. How can I prove that? I don't have a job. I don't have any income coming in. If you can't get anything, if there is nothing to get."

The court held that Ms. Keuthan was in "willful violation of the court's orders." The docket sheet clarifies that the court found that Ms. Keuthan voluntarily impoverished herself. We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Collins v. Collins*, 144 Md. App. 395, 408

(2002) (citing Md. Rule 8-131(c)). We cannot conclude that lower court's judgment that Ms. Keuthan voluntarily impoverished herself was clearly erroneous, in light of the facts.

Lastly, Ms. Keuthan contends that the court erroneously set a purge amount without determining her present ability to pay it. "Before incarceration is imposed. the contemnor must be provided with the opportunity to show that . . . she is unable, rather than unwilling, at that time, to make the court-ordered payments." *Redden v. Dep't. of Soc. Serv.*, 139 Md. App. 66, 74 (2001) (citation omitted) (holding that where appellant's sources of income were food stamps and government assistance, the court's imposition of a prison term was in error.) Ms. Keuthan must prove her inability to pay by a preponderance of the evidence. *See Lynch v. Lynch*, 342 Md. 509, 527-28 (1996) (holding that where a defendant was unemployed, had no assets, did not receive public assistance, lived rent-free in her mother's house, and received free food, a court's finding that she enjoyed a "discretionary lifestyle," was insufficient to establish her ability to purge contempt).

In a statement wanting of precision., the court said:

> I have serious questions about credibility. I have heard the testimony of Ms. Koffley, I have no idea of what I believe or disbelieve about her employment situation, income situation, or what is going on. I have no idea whether what she portrays to the court of what happened . . . in fact happened but I know she has money to continue to come to court.

Ms. Keuthan testified that she filed for bankruptcy in 2001, and that she was jobless. She offered evidence of having $462 in her checking account and $479 in her savings account at the time of trial. Also, she earned only $279.27 since quitting her job. Since then, her brother had been

making her mortgage payments. Relying only on the fact that "she has money to come to court," the court was clearly erroneous in determining that Ms. Keuthan had a present ability to pay the purge amount of $6,270. *See Goodwin v. Lumbermens Mut. Cas. Co.*, 199 Md. 121, 129 (1952) ("if the trial court does not say what it finds to be the facts, no presumption as to them arises merely from the decision.").

IV.

Fourth, Ms. Keuthan argues that the court appointed a guardian *ad litem* ("GAL") as a sanction, and that the court failed to indicate how Ms. Keuthan could purge this appointment. In the course of testifying in support of Ms. Keuthan's motion for contempt against Mr. Koffley, her therapist, Dr. Philip Briley, recommended that the court appoint a GAL to facilitate visitation. The court subsequently accepted that recommendation.

We note that "[a]ppointment of counsel is discretionary." *Miller v. Bosley*, 113 Md. App 381, 400 (1997) "Generally, the court stands as a guardian to all children, and may take action to protect and advance their welfare and interests." *Id.* at 394 (citation omitted). Furthermore,

> [i]n addition to any requirements relating to the appointment of counsel for children, at any time during the pendency of any action under this subtitle, where it appears to the court that the protection of the rights of a child requires independent representation, the court may, upon its own motion, or the motion of any party to the action, appoint an attorney to represent the interest of the child in that particular action . . .

Md. Code (1973, 2002 Repl. Vol., 2003 Supp.), Cts. & Jud. Proc. 3-8A-32.

Additionally, the Family Law Code states:

> 1. In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the Court may:
>
> 2. appoint to represent the minor child counsel who may not represent any party to the action; and
>
> 3. impose against either or both parents counsel fees.

Md. Code (1984, 1999 Repl. Vol., 2003 Supp.), Fam. Law § 1-202.

Ms. Keuthan's assertion that the court appointed the GAL as a sanction for her contempt is without merit. Dr. Briley testified that visitation with both parents was in the best interest of the children, and that the children might resist visiting with Ms. Keuthan for reasons unrelated to her ability to care for them. The court "wanted to find out what was going on [at the children's homes and during visitation]," and it wanted the GAL "to represent the [children's] interests." The court has discretion to appoint counsel to investigate and to serve as a GAL. *Miller*, 113 Md. App. at 400 (citing *Leary v. Leary*, 97 Md. App. 26, 40 (1993)). We affirm the court's appointment of a GAL.

APPEAL DISMISSED IN PART; JUDGEMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY OTHERWISE AFFIRMED.

APPELLANT AND APPELLEE TO SPLIT COSTS.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN MARIE KEUTHAN
(f/k/a Lynn Marie Koffley),

Plaintiff

v. Case No.: CAD 96-08217

JOSEPH J. KOFFLEY, JR.,

Defendant

ORDER

UPON CONSIDERATION of the Hearing in this case on June 21, 2004, as scheduled by the Court Order of February 24, 2004, it is, this 25th day of June, 2004, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the suspension of the Plaintiff's right to have visitation with the three (3) minor children of the parties, namely, Katrina, Patrick and Victoria, shall stay in effect pending further Order of Court; and, it is further,

ORDERED, that beginning with, and accounting from, June 21, 2004, the Plaintiff shall pay to the Defendant the sum of Two Thousand One Hundred Fifty-Eight Dollars ($2,158.00) per month as and for child support for the three (3) minor children of the parties, said child support payments to be made directly from the Plaintiff to the Defendant by means of a certified check, cashier's check or money order; and, it is further,

ORDERED, that the Plaintiff be and is hereby found to be in arrears in child support as of June 18, 2004, in the amount of Four Thousand Five Hundred Fifty-One Dollars and Forty Seven Cents ($4,551.47); and, it is further,

ORDERED, that beginning with and accounting from, June 21, 2004, the Plaintiff shall pay to the Defendant the additional sum of Three Hundred Forty-Two Dollars

($342.00) per month on said arrearage until the arrearage is paid in full, said monthly arrearage payments shall be made directly from the Plaintiff to the Defendant by means of a certified check, cashier's check or money order; and, it is further,

ORDERED, that the Defendant shall continue to maintain health and hospitalization insurance coverage on the three (3) minor children of the parties; and, it is further,

ORDERED, that Bruce A. Johnson, Jr., Esquire, Court Appointed Trustee for the sale of the former Marital home of the parties, located at 9612 Ponca Place, Fort Washington, MD 20744, be and is hereby ordered to pay FORTHWITH to the Defendant, Joseph John Koffley, Jr., the sum of Twenty-Seven Thousand Three Hundred Thirty-Four Dollars and Ten Cents ($27,334.10), said sum representing the balance of monies held by said Trustee in his escrow account relative to the sale of the above-said former marital home on or about February 11, 2004; and, it is further,

ORDERED, that the Plaintiffs request to claim one or more of the three (3) minor children as a dependent on her State and Federal income tax returns be and is hereby denied; and, it is further,

ORDERED, that the Plaintiff's Motion to Modify the amount of child support be and is hereby denied; and, it is further,

ORDERED, that the Federal Government EE Bonds; a list of which is attached hereto and made a part hereof; previously registered in the names of Joseph J. Koffley or Katrina L. Koffley, and Joseph J. Koffley or Patrick J. Koffley, be and are hereby declared lost; and, it is further,

ORDERED that the Defendant, Joseph J. Koffley, Jr., be and is hereby directed and allowed to apply through the Department of the Treasury, Bureau of the Public Debt, for

substitute bonds in the same names and in the same amounts as indicated on the attached list; and, it is further,

ORDERED. that a rehearing on the issue of the Plaintiff's right to visit with her children be and is hereby scheduled for February 18. 2005, at 9:00 a.m., at which time the three (3) minor children shall be present.

/s/ Herman C. Dawson
Herman C. Dawson, Judge
Circuit Court for Prince George's
County, Maryland

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN MARIE KEUTHAN
(f/k/a Lynn Marie Koffley),

Plaintiff

v. Case No.: CAD 96-08217

JOSEPH J. KOFFLEY, JR.,

Defendant

ORDER

THIS MATTER having come before the Court on Motions filed by Plaintiff and Defendant and a Status Review of the Temporary Consent Order of Court dated October 16, 2001, as provided therein, and this Court having taken testimony and having received evidence commencing February 9, 2004 through February 12, 2004. and the Court having made Findings of Fact on the record in open Court, it is, this 24th day of February 2004 by the Circuit Court for Prince George's County, Maryland.

ORDERED, that the Plaintiff's Ninth Motion for Contempt be and is hereby denied; and, it is further,

ORDERED, that all other Orders of this Court pertaining to the issues of custody and visitation, other than the provision in the Amended Order of Court of Judge Joseph S. Casula, dated April 17, 1998, granting Defendant, Joseph John Koffley, Jr., the sole legal and physical custody of the three (3) minor children of the parties, namely Katrina Koffley, Patrick Koffley and Victoria Koffley, be and are hereby vacated and rescinded; and, it is further,

ORDERED, that the Defendant shall seek counseling and therapy for the three (3) minor children of the parties; and, it is further,

ORDERED, that Judgment be and is hereby awarded

against the Plaintiff Lynn Marie Keuthan, in favor of the Defendant, Joseph John Koffley, Jr., in the amount of $16,141.25 as and for a contribution toward Defendant's counsel fees in these proceedings; and, it is further,

ORDERED, that a Review Hearing in this case be and is hereby scheduled for June 21, 2004, at 9:00 a.m. at which time the three (3) minor children shall be present.

/s/ Herman C. Dawson
Herman C. Dawson, Judge
Circuit Court for Prince George's
County, Maryland

Copies to:

Lawrence A. Marzetti, Esquire
6188 Oxon Hill Road
Suite 301
Oxon Hill, MD 20745-3157

Paul B. Jorgensen, Esquire
215 North Main Street
Middletown, MD 21769

Jo Benson Fogel, Esquire
Georgetowne Park
5900 Hubbard Drive
Rockville, MD 20852

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN MARIE KEUTHAN
(f/k/a Lynn Marie Koffley),

Plaintiff

v. Case No.: CAD 96-08217

JOSEPH J. KOFFLEY, JR.,

Defendant

FORTHWITH ORDER OF COURT

This matter came having come before the Court on various Motions and a Status Review of the Temporary Consent Order of Court, dated October 16, 2001, and this Court having taken testimony commencing February 9 through February 12, 2004, it is this 13th day of February 2004, by the Circuit Court for Prince George's County, Maryland

ORDERED, that all visitations between the Plaintiff, Lynn Marie Keuthan, and the involved three minor children, be and hereby is SUSPENDED this 13th day of February 2004, until further Order of Court.

/s/ Herman C. Dawson
Herman C. Dawson, Judge
Circuit Court for Prince George's
County, Maryland

Copies sent by the Court to:

Lawrence A. Marzetti, Esquire
6188 Oxon Hill Road
Suite 301
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Paul B. Jorgensen, Esquire
215 North Main Street
Middletown, MD 21769

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN MARIE KOFFLEY

Plaintiff

v. Case No.: CAD 96-08217

JOSEPH J. KOFFLEY, JR.,

Defendant

ORDER

Upon consideration of Plaintiff's Motion to Recuse and Reassign and a review of the entire file, it is this 18th day of July, 2003, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Motion for Recuse and Reassign shall be and it is hereby DENIED; and it is further

ORDERED, that this matter is scheduled for a status hearing before the undersigned on September 9, 2003, at 8:30 a.m., and it is further

ORDERED, that the Court will reserve ruling on Plaintiff's Ninth Petition for Contempt until a report has been received from Attorney Jo Benson Fogel, attorney for the involved minor children.

/s/ Herman C. Dawson
Herman C. Dawson, Judge
Circuit Court for Prince George's
County, Maryland

Copies mailed by the Court to:

Honorable William L. Missouri

Lawrence A. Marzetti, Esquire
6188 Oxon Hill Road, #301
Oxon Hill, MD 20745-3157

Jo Benson Fogel, Esq.
Law Offices of Jo Benson Fogel, P.A.
Georgetowne Park
5900 Hubbard Drive
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IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN M. KOFFLEY,	:	
Plaintiff	:	
v.	:	Case No.: CAD 96-08217
JOSEPH J. KOFFLEY, JR.,	:	
Defendant	:	

TEMPORARY CONSENT ORDER

Pursuant to the agreement of the Parties, as indicated by their respective signatures hereon, and it appearing that the provisions of this Order concerning the minor children are appropriate and in their best interest, and it further appearing that the other provisions of the instant Consent Order are fair and equitable, it is, therefore, by the Circuit Court for Prince George's County, Maryland, this 16 day of October, 2001,

ORDERED, that the prior Orders of this Court are amended so as to conform with the instant Consent Order, and it is further

ORDERED, that the Plaintiff, LYNN MARIE KEUTHAN KOFFLEY, and the Defendant, JOSEPH JOHN KOFFLEY, shall have joint legal care and custody of the minor children, KATRINA LYNN KOFFLEY, born October 29, 1988; PATRICK JOSEPH KOFFLEY, born May 1, 1990, and VICTORIA L. KOFFLEY, born November 17, 1993, with the Defendant continuing to maintain primary residential custody, and they shall endeavor to make joint decisions concerning the minor children in accordance with the following protocol:

1. The Parties (hereinafter the "Parties" being defined as the Plaintiff, Defendant and the minor children) shall set aside a minimum of one hour per week for a meeting with a mutually agreeable family therapist whereat

they will raise and discuss all important issues concerning the children. The Parties will meet with the family therapist on a more frequent basis if necessary.

2. The Parties' discussions with the family therapist will not be privileged. The therapist will report to the Court immediately in the event that either Party is not fully cooperating. The family therapist mandate is to assist the Parties in learning to communicate with each other so that, hopefully, they will reach a point in time whereby they are able to effectively communicate without the necessity of doing so in the presence of the family therapist. The family therapist will assist the Parties in reaching joint decisions that are in the best interest of the minor children. All Parties shall be free to raise and discuss any issues pertaining to the children with the family therapist so as to obtain assistance in resolving issues concerning the children in a manner and in such a way that their best interest is served. Both Parties shall be entitled to request additional time with the family therapist and the children will be involved in the discussions as necessary.

3. In the event that important decisions need to be made concerning the children, unless an emergency exists, the issues shall be raised and discussed with the family therapist. In the event that the Parties are unable to reach a mutually agreeable decision concerning the children, the Defendant, JOSEPH JOHN KOFFLEY, shall be entitled to make the decision subject to review and decision by the Court if necessary.

4. In the event that the Plaintiff, LYNN MARIE KEUTHAN KOFFLEY believes that the decision by the Defendant is not in the best interest of the children, she shall be entitled to request that the Court make the decision. The Court is committed to holding a prompt hearing concerning the issue and the family therapist will be requested to render their opinion concerning the issue under consideration. The nonprevailing Party shall pay for the therapist's involvement

in the Court proceeding and the other Party's reasonable counsel fees and costs.

5. The Parties shall not, under any circumstances, use the children as messengers. The Parties shall communicate directly by e-mail or by telephone. The Parties are encouraged to resolve as many issues as possible outside of the family therapy sessions, and it is further

ORDERED, that the children shall live with each parent in accordance with the calendar which is attached to and incorporated in this Court's Consent Order through May 31, 2002. The Parties shall begin meeting with the family therapist in May of each year so they will have one full month to mark up a calendar for the following year. The children shall be with each Party in accordance with the aforesaid calendar, without deviation, unless the Parties otherwise mutually agree in writing, and the children will be picked up and delivered in accordance with the aforesaid calendar without deviation. In the event that either Party will be late for pick up or delivery, they shall contact the other Party immediately when they determine that they will be late, and it is further

ORDERED, that the Parties shall additionally:

1. In no manner, either directly or indirectly, seek to influence or alienate the children against the other Party or any members of the other Party's family, nor shall they allow the children to be in the presence of any other individual who may do so. Neither Party shall make any negative or derogatory comment whatsoever concerning the other Party or members of the other Party's family, nor will they allow the children to be in the presence of anyone who may do so.

2. The Parties shall give the other Party a full and complete itinerary (telephone numbers, addresses, travel schedules, individuals who will be with the minor children, etc.), if any of the minor children will be sleeping away from

the Party's residence on any occasion, unless the child has a sleepover with a friend.

3. The Parties further agree to announce their vacation and travel plans at the earliest possible opportunity so that the Parties will be able to coordinate their time with the children. The Parties shall give 45 days written notice of their intention to take the children out of the United States.

4. The Parties and other members of their respective families shall have unrestricted telephone access with the children prior to 8:30 p.m. If for any reason the children are unavailable to receive telephone calls, whichever Party is receiving the telephone call will have the responsibility to advise the children return the telephone call when they become available.

5. That each of the Parties shall take precedence over other third parties and child care providers or babysitters, and they shall have the right of first refusal, when it becomes necessary to leave the children with any other individual for over five hours.

6. That neither Party shall make any plans, appointments or arrangements for the minor children which would in any way interfere with the time that the children are scheduled to be with the other Party. The Parties shall coordinate their times with the children so as not to interrupt bona fide school activities or medical appointments. The Parties will arrange the children's extracurricular activities in the context of the family therapy sessions so that the children will be able to participate in a full range of extracurricular and enrichment activities and each Party will be responsible for seeing to it that the children are at their activities as scheduled. These matters will be coordinated through the family therapist.

7. That each of the Parties are legally entitled to obtain medical treatment for the minor children in life-threatening or emergency situations. If, in fact, medical or

mental health treatment is to be scheduled in advance, the other Party is to be consulted and shall have full and complete access to all non-privileged medical and/or mental health information and/or records concerning the children. Under no circumstances, other than a bona fide emergency, shall either party obtain any medical or mental health treatment for the children without advance notification to the other Party. If, in fact, it is impossible to contact the other Party or consult with the other Party prior to or during the administration of emergency medical or mental health treatment, then, and in that event, the other Party shall be notified immediately at the first opportunity.

8. The Parties shall fully cooperate in exchanging clothing, personal belongings, toys, etc., belonging to or used by the minor children so that the children will have the benefit of all of their belongings and/or items which they customarily use, no matter which Party they are residing with at the time. The receiving Party shall be responsible for returning the items to the other Party.

9. Both Parties shall have full access to all records pertaining to the children, including, but not limited to, school, medical, non-privileged mental health, religious and/or extracurricular activities.

10. That both Parties shall be listed on all emergency, school and contact records pertaining to the children.

ORDERED, that the Court shall forthwith issue its Opinion and Judgment concerning the remaining issues which have previously been submitted and briefed, and it is further

ORDERED, that this matter shall be set scheduled for a review hearing in May of 2002, to review the Parties progress in complying with this Temporary Consent Order; to determine if this Temporary Consent Order needs to be modified, vacated or made permanent, and to hear the

presently pending Contempt Motions if necessary, as well as any other matters which are then properly at issue.

/s/ Herman Dawson
Herman Dawson, Judge
Circuit Court for Prince George's County

TRUE COPY-TEST
/s/ Rosalyn E. Puch #39
Clerk

WE CONSENT AND RESPECTFULLY REQUEST THAT THIS HONORABLE COURT ENDORSE AND ISSUES THIS CONSENT ORDER.

/s/ Joseph John Koffley
JOSEPH JOHN KOFFLEY, *Defendant*

/s/ Lynn Marie Koffley
LYNN MARIE KEUTHAN KOFFLEY, *Plaintiff*

/s/ Lawrence A. Marzetti
Lawrence A. Marzetti, Esquire
6188 Oxon Hill Road, #403
Oxon Hill, MD 20745-3157
(301) 839-3600
Counsel for the Defendant/Counter Plaintiff

JOSEPH, GREENWALD & LAAKE, P.A.
By: /s/ Stephen A. Friedman
Stephen A. Friedman, Esquire
6404 Ivy Lane, suite 400
Greenbelt, MD 30770
301-220-2200

Counsel for the Plaintiff/Counter Defendant

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN M. KOFFLEY,	:	
Plaintiff	:	
v.	:	Case No.: CAD 96-08217
JOSEPH J. KOFFLEY, JR.,	:	
Defendant	:	

AMENDED ORDER OF COURT

This matter came before the Court on the issues of custody and visitation of the minor children Katrina Koffley, Patrick Koffley, and Victoria Koffley. Plaintiff, Lynn Marie Keuthan Koffley, alleged the defendant, Joseph Koffley, physically abused her. The defendant questioned the veracity of the plaintiff. Neither allegation has any merit. Nor has the plaintiff or defendant produced credible evidence to support such allegations.

This Court must take into account the "best interest" of the children when awarding custody.

> The court examines numerous factors and weighs the advantages and disadvantages of the alternative environments. The criteria for judicial determination include: 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender. Best v. Best, 93 Md. App. 644, 613 A.2d 1043 (1992).

In applying these factors to determine the "best interest" of the children and examining the totality of the circumstances, it appears that the best interest of the children remains with their father. Therefore, this Court finds no reason to change custody at this time.

The issues of custody and visitation standing ready for hearing, and having come on for hearing before this Court, it is this 17th day of April, 1998, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Defendant shall have sole custody of the parties' three (3) minor children, Katrina Koffley, Patrick Koffley, and Victoria Koffley; and it is further,

ORDERED, that the Plaintiff shall have visitation with the parties' three (3) minor children as follows:

1. Alternate weekends commencing Thursday at 6:00 P.M. until Monday at 8:00 A.M. (before school during the school year), beginning May 29, 1997;

2. Every Thursday evening from 6:00 P.M. until 8:30 P.M., unless the children are scheduled to be with the Defendant;

3. The entire month of August except that the Plaintiff shall return the children to the Defendant no later than three days before school begins, even if school begins on a date that falls in August, with alternating weekends to the Defendant during the month of August, except that the Plaintiff, if she desires, may have two weeks of summer vacation during August exclusive of visitation by the Defendant; and Defendant shall have the children for the months of June and July with alternating weekends to the Plaintiff during the months of June and July, except that the Defendant, if he desires,

may have two weeks of summer vacation during the months of June and July exclusive of visitation by the Plaintiff;

4. In the even years when Defendant has the children for the Christmas holiday from December 24 until December 26 at 10:00 A.M., the Plaintiff shall have the children from December 26 until 6:00 P.M. the day preceding the resumption of school;

5. In the odd years when Plaintiff has the children for the Christmas holiday from December 24 until December 26 at 10:00 A.M., the Defendant shall have the children from December 26 until 6:00 P.M. the day preceding the resumption of school;

6. In those years in which Veteran's Day does not fall on a Monday or Friday, Plaintiff shall have the children from 6:00 P.M. the evening preceding Veteran's Day and return the children to the Defendant at 7:30 P.M. on Veteran's Day;

ORDERED, that the parties shall split equally the children's spring break, with Plaintiff having the children for the first half of the spring break and the Defendant having the children for the second half of the spring break; and it is further,

ORDERED, the Defendant shall arrange for copies of all notices of all activities and events to be sent to the Plaintiff, including, but not limited to PTA meetings, parent\teacher conferences, parties, dances, plays, sporting events, field trips, report cards, advisories, notices, and paper writing of any kind and description; and it is further,

ORDERED, that the Defendant shall consult with the Plaintiff and take into consideration her views regarding the non-emergency emotional, moral educational, physical and general welfare of the minor children. In the event of a

disagreement, the Defendant shall make the final decision; and it is further,

ORDERED, that the Defendant shall keep the Plaintiff informed of the status of the minor children's medical conditions and treatments, and shall execute any authorizations so that such information concerning the children shall be available to her; and it is further,

ORDERED, that the issue of attorney's fees is hereby reserved until further hearing on the matter.

/s/ Joseph S. Casula
JOSEPH S. CASULA, JUDGE

Copies Mailed by the Court To:

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11300 Rockville Pike, Suite 1009
Rockville, Maryland 20852

Lawrence A. Marzetti, Esquire
6188 Oxon Hill Road, Suite 301
Oxon Hill, Maryland 20745

III. Material Pursuant To Rule 14(1)(i)(vi)

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN KOFFLEY,

Plaintiff,

v. Case No. CAD 96-08217

JOSEPH KOFFLEY,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

Upper Marlboro, Maryland
July 14, 2005

BEFORE:
HONORABLE C. PHILIP NICHOLS, JR.

[p. 23] * * *

[MS. FOGEL:] In addition, all though Ms. Koffley—Ms. Keuthan appears to have the where with all to continue the litigation, the judgment on my prior attorneys fees has not been paid. I don't know about Mr. Marzetti. And I am aware that there were times, for example where Katrina's grades were withheld because tuition had not been paid because the child support had not been paid.

* * *

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

LYNN KOFFLEY,

Plaintiff,

v. Case No. CAD 96-08217

JOSEPH KOFFLEY,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

Upper Marlboro, Maryland
Friday, January 23, 2004

BEFORE:
HONORABLE JUDGE DAWSON

[p. 12] * * *

THE COURT: Mr. Marzetti?

MR. MARZETTI: Yes sir?

THE COURT: When did I ever state that Ms. Keuthan was overpaying child support?

MR. MARZETTI: You never did. You never stated she was overpaying child support.

MR. JORGENSON: I do have a transcript Your Honor. [p. 13]

THE COURT: When did I say that she was overpaying child support?

MR. JORGENSON: You didn't say it. What you said, this was on June 24, 1999, and this was right after the parties divorced.

THE COURT: What did I say?

MR. JORGENSON: And this is what you said; we're not going to have a different judge making different decisions without knowing. I have no idea why one judge may do something other than leaving the record. I may have done something totally different -

THE COURT: What did I say about -

MR. JORGENSON: I may have not set the support at the amount of the support that was set. I do believe we need to review the child support issue because I believe the child support issue is set with a figure that was used for the daycare provider.

THE COURT: Okay. Where did I state that Ms. Keuthan, your client, was overpaying child support?

MR. JORGENSON: Where she was what?

THE COURT: Overpaying child support.

MR. JORGENSON: Well, that's what Your Honor said in the transcript.

THE COURT: I just asked you a question. Where did I state that your client was overpaying child support?

MR. JORGENSON: I didn't say you said that Your Honor. This is what I've seen in the transcript. I [p. 14] understand there were things said in chambers, but wasn't privy to them.

THE COURT: I'm asking anybody, when did I ever state that Ms. Keuthan was overpaying child support?

MR. MARZETTI: You never said that at any time, and I've been in this case from day one.

THE COURT: Okay.

MR. JORGENSON: And Your Honor, again, I wasn't in chambers, but this issue was raised and argued in

brief before Your Honor before the divorce -

THE COURT: When did I ever state that Ms. Keuthan was overpaying child support?

MR. JORGENSON: Again Your Honor, I wasn't privy to the conferences.

THE COURT: I asked you a question. When did I ever state it? You don't know?

MR. JORGENSON: I'm saying I don't know. I read to Your Honor exactly what Your Honor said about it that I could find.

THE COURT: That wasn't the question. The question was, when did I ever state it? The reason why is because your client has sent Chief Judge Bell a letter saying that I said quote, "since that time Judge Dawson has repeatedly stated that I have been overpaying child support. And he realizes that he needs to address that it and it is effecting my ability to care for the children," end of quote. You saw that? **[p. 15]**

MR. JORGENSON: I don't know what letter you're talking about.

THE COURT: Dated January 20 to Chief Judge Bell.

MR. JORGENSON: I haven't seen the letter Your Honor.

THE COURT: Why not?

MR. JORGENSON: Well, because this file's probably about six feet long and I've looked through a lot of this.

THE COURT: This is a letter from your client.

MR. JORGENSON: When is it dated again?

THE COURT: January 20, 2004.

MR. JORGENSON: January 20?

THE COURT: 2004.

MR. JORGENSON: No, I was not even aware of its existence.

THE COURT: And let me ask you this question, is your client requesting a change in custody?

MR. JORGENSON: No. No she's not.

* * *

[p. 94] * * *

MS. FOGEL: Property and child support I'm not a party to. The only other thing Your Honor, and the guardian's and attorney's fees I think will be an issue in the proceedings. I intend to submit a proposed Order, and I had submitted discovery to both parties. And as part of that I had asked for the documents in the KML Trust. And Counsel opposed that, filed a Motion for Protective Order, I filed my response, which I think is right now. And the reason that I'm seeking the documents in the KML Trust, is because if there are funds available for the children, either for mental health reasons, or the attorney's fees in these proceedings, or for any other reason, and those assets are for the benefit of the children in the KML Trust, I think I'm entitled to know that for the benefit of the children. And Counsel has indicated that the children are not parties to these proceedings and there their attorney is not entitled to that information. I am seeking that information to determine whether there are assets available for the benefit of the children. Because one of Dr. Sullivan's recommendations is that the two younger children be involved in ongoing therapy.

* * *